DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 12-158
Title: Carol Anne Bond, Petitioner
v.
United States
Docketed: August 3, 2012
Linked with 13A237
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (08-2677)
Decision Date: May 3, 2012
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Aug 1 2012	Petition for a writ of certiorari filed. (Response due September 3, 2012)
Aug 24 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Aug 29 2012	Order extending time to file response to petition to and including October 4, 2012.
Aug 31 2012	Brief amici curiae of Cato Institute, et al. filed.
Sep 4 2012	Brief amicus curiae of American Center for Law and Justice filed.
Oct 4 2012	Brief of respondent United States in opposition filed.
Oct 4 2012	Brief amicus curiae of Yale Law School Center for Global Legal Challenges filed.
Oct 16 2012	Reply of petitioner Carol Anne Bond filed.
Oct 17 2012	DISTRIBUTED for Conference of November 2, 2012.
Nov 5 2012	DISTRIBUTED for Conference of November 9, 2012.
Nov 13 2012	DISTRIBUTED for Conference of November 20, 2012.
Nov 26 2012	DISTRIBUTED for Conference of November 30, 2012.
Dec 3 2012	DISTRIBUTED for Conference of December 7, 2012.
Dec 17 2012	DISTRIBUTED for Conference of January 4, 2013.
Jan 7 2013	DISTRIBUTED for Conference of January 11, 2013.
Jan 14 2013	DISTRIBUTED for Conference of January 18, 2013.
Jan 18 2013	Petition GRANTED.
Feb 6 2013	The time to file the joint appendix and petitioner's brief on the merits is extended to and including May 8, 2013.
Feb 6 2013	The time to file respondent's brief on the merits is extended to and including August 9, 2013.
Apr 16 2013	Consent to the filing of amicus curiae briefs, in support of either party or of

	neither party, received from counsel for the petitioner.
May 8 2013	Joint appendix filed. (Statement of costs filed)
May 8 2013	Brief of petitioner Carol Anne Bond filed.
May 14 2013	Brief amicus curiae of Goldwater Institute Scharf-Norton Center for Constitutional Litigation filed.
May 15 2013	Brief amici curiae of U.S. Congressman Steve Stockman, et al. filed.
May 15 2013	Brief amicus curiae of American Center for Law and Justice filed.
May 15 2013	Brief amici curiae of Commonwealth of Virginia and the States of Alabama, et al. filed.
May 15 2013	Brief amicus curiae of Center for Individual Rights filed.
May 15 2013	Brief amicus curiae of Home School Legal Defense Association filed.
May 15 2013	Brief amicus curiae of Judicial Education Project filed.
May 15 2013	Brief amici curiae of Cato Institute, et al. filed.
Aug 7 2013	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondent.
Aug 9 2013	Brief of respondent United States filed.
Aug 16 2013	Motion of Cato Institute, et al. for leave to participate in oral argument as amicus curiae and for divided argument filed.
Aug 16 2013	Brief amici curiae of Professors Sarah H. Cleveland, and William S. Dodge filed.
Aug 16 2013	Brief amici curiae of Professors David M. Golove, Martin S. Lederman, and John Mikhail filed.
Aug 16 2013	Brief amicus curiae of Constitutional Accountability Center filed.
Aug 16 2013	Brief amici curiae of Chemical Weapons Convention Negotiators and Experts filed.
Aug 16 2013	Brief amicus curiae of Yale Law School Center for Global Legal Challenges filed.
Aug 16 2013	Brief amicus curiae of American Chemistry Council filed.
Aug 16 2013	Brief amici curiae of Former State Department Legal Advisers filed.
Aug 16 2013	Brief amicus curiae of David Boyle filed.
Aug 16 2013	Brief amici curiae of Professors of International Law and Legal History filed.
Aug 16 2013	Brief amici curiae of Former State Department Legal Advisers filed. (Distributed)
Aug 19 2013	CIRCULATED.
Aug 20 2013	SET FOR ARGUMENT on Tuesday, November 5, 2013.
Aug 29 2013	Application (13A237) to extend the time to file a reply brief on the merits from September 9, 2013 to September 16, 2013, submitted to Justice Alito.
Sep 4 2013	Application (13A237) granted by Justice Alito extending the time to file until September 16, 2013.
Sep 11 2013	Record from USCA Third Circuit is electronic.
Sep 11 2013	Record from the USDC for the District of Pennsylvania is electronic.
Sep 16 2013	Reply of petitioner Carol Anne Bond filed. (Distributed)
Oct 7 2013	Motion of Cato Institute, et al. for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
Nov 5 2013	Argued. For petitioner: Paul D. Clement, Washington, D. C. For respondent:

Donald B. Verrilli, Jr., Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

12-158

No. _____

In the

Supreme Court of the United States

CAROL ANNE BOND,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two years ago, this Court held that petitioner had standing to challenge her criminal conviction as a violation of the Constitution's structural limits on federal authority. *See Bond v. United States*, 131 S. Ct. 2355 (2011). The Court rejected the argument that Congress' reliance on the treaty power somehow defeated petitioner's standing. On remand, however, the court of appeals held that, while petitioner had standing, her constitutional challenge was a non-starter because the basic limits on the federal government's power are not "applicable" to statutes purporting to implement a valid treaty. App. 36 n.21. Although it had grave misgivings about its decision, the Third Circuit viewed this startling result as compelled by dictum in *Missouri v. Holland*, which states that "if [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. 416, 432 (1920). The court thus broadly construed *Holland* as allowing the Senate and the President to expand the federal government's constitutional authority by negotiating a valid treaty requiring implementing legislation otherwise in excess of Congress' enumerated powers.

The questions presented are:

Do the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope of the treaty, intrudes on traditional state

prerogatives, and is concededly unnecessary to satisfy the government's treaty obligations?

Can the provisions of the Chemical Weapons Convention Implementation Act, codified at 18 U.S.C. § 229, be interpreted not to reach ordinary poisoning cases, which have been adequately handled by state and local authorities since the Framing, in order to avoid the difficult constitutional questions involving the scope of and continuing vitality of this Court's decision in *Missouri v. Holland*?

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ICRC Advisory Serv. on Int'l Humanitarian Law,
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PETITION FOR WRIT OF CERTIORARI

Two Terms ago, in *Bond v. United States*, 131 S. Ct. 2355 (2011), this Court unanimously held that petitioner had standing to argue that the Chemical Weapons Convention Implementation Act exceeded Congress' enumerated powers as applied to her conduct. Although the argument then properly focused on the standing question, the breadth of both the government's view of the statute's reach (covering the poisoning of a neighbor's goldfish) and its legal theory (defending even that hypothetical as a valid exercise of the Commerce and Treaty powers) was on full display. Nonetheless, on remand, the court of appeals rejected any effort to limit the statute's application and embraced a view of the federal treaty power that would give Congress unlimited authority to implement a valid treaty.

That cannot be the law. The Framers did not empower the Senate and the President to expand Congress' power by negotiating a valid treaty with a foreign nation. While the Constitution clearly empowers federal authorities to negotiate and ratify treaties, it nowhere suggests that the federal government alone is responsible for implementing them or that the normal structural limits do not apply to treaty-implementing federal legislation. The Third Circuit, and especially Judge Ambro in his concurrence, was not happy with the implications of this expansive view of the treaty power, but it viewed itself bound by this Court's 92-year-old decision in *Missouri v. Holland*, 252 U.S. 416 (1920).

A domestic dispute culminating in a thumb burn is not an obvious candidate for a federal prosecution,

let alone one under a statute designed to implement the Chemical Weapons Convention. But such prosecutions are the inevitable result of the government's view of its unlimited authority under the treaty power. The court of appeals endorsed the government's view, but made clear that it considered its hands tied by this Court's decision in *Holland*. Whether or not that is the best reading of *Holland* or whether *Holland* needs to be reconsidered, it is clear that only this Court can correct this injustice and clarify that statutes enacted to implement valid treaties, like all other laws, must comply with the Constitution's bedrock structural limits on our system of limited but enumerated federal powers. The Court should grant this petition.

OPINIONS BELOW

The opinion of the court of appeals is reported at 681 F.3d 149 and reproduced at App. 1–47. The earlier opinion of the court of appeals, denying petitioner's standing, is reported at 581 F.3d 128 and reproduced at App. 48–72. This Court's decision reversing that opinion is reported at 131 S. Ct. 2355. The district court's unpublished bench ruling denying petitioner's motions to suppress and dismiss is reproduced at App. 84–85.

JURISDICTION

The court of appeals issued its opinion on May 3, 2012. App. 1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Necessary and Proper Clause, the Treaty Clause, and the Tenth Amendment to the United States Constitution are reproduced at App. 135–37.

The relevant portions of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the "Chemical Weapons Convention") are reproduced at App. 146–61 and *available at* http://www.opcw.org/chemical-weapons-convention.

The relevant portions of the Chemical Weapons Convention Implementation Act are codified at Title 18, section 229 of the United States Code and reproduced at App. 138–45.

STATEMENT OF THE CASE

This is the second time this case has come before the Court. The case arises out of a domestic dispute seemingly unlikely to provoke a federal prosecution, let alone a novel invocation of a statute designed to implement a major international treaty.

A. The Underlying Domestic Dispute

Petitioner Carol Anne Bond is a 42-year-old woman who, until her incarceration, lived with her husband and adopted child in Lansdale, petitioner lived most of her life in Barbados. App. 109–10. She was raised by her mother and, as a young child, remembers her father having multiple affairs and children outside of marriage. App. 109. In 1995, petitioner moved to the United States and became close friends with Myrlinda Haynes, another

Barbados immigrant who lived in nearby Norristown, Pennsylvania. Petitioner came to consider and treat Haynes as a sister. App. 100, 110.

In 2006, Haynes announced that she was pregnant. Unable to bear a child of her own, petitioner was initially excited for her closest friend. App. 49. But that excitement vanished when petitioner discovered that her own husband was the child's father. *Id.* This double betrayal brought back painful memories of her father's infidelities, and petitioner suffered an emotional breakdown. App. 116–17. She was depressed, her hair fell out, and she suffered panic attacks. *Id.*

In the midst of this breakdown, petitioner decided to punish Haynes. App. 91. She purchased a vial of potassium dichromate from a photography equipment supplier on Amazon.com, and stole a bottle of 10-chloro-10-H-phenoxarsine (an arsenic-based chemical) from her employer. App. 49. Petitioner knew the chemicals were irritants and believed that, if Haynes touched them, she would develop an uncomfortable rash. App. 101. Although both chemicals are toxic and, if ingested or exposed to the skin at sufficiently high doses, can be lethal, App. 49 n.1, the undisputed evidence shows that petitioner had no intent to kill Haynes, App. 101, 104.

Between November 2006 and June 2007, petitioner went to Haynes' home on several occasions and spread chemicals on Haynes' car door, mailbox, and apartment doorknob. App. 49–50. None of these attempted assaults was sophisticated or successful. Haynes avoided the easy-to-spot chemicals (potassium dichromate is bright orange) on all but

one occasion when she sustained a minor chemical burn on her thumb. App. 97. This one-time thumb burn is the only physical injury Haynes ever sustained. *Id.*

When Haynes complained to the local police and the postal service, postal inspectors installed surveillance cameras in and around her home. App. 50. The cameras captured petitioner opening Haynes' mailbox, stealing an envelope, and stuffing potassium dichromate inside the muffler of Haynes' car. *Id.* On June 8, 2007, postal inspectors arrested petitioner. App. 87.

Petitioner's arrest shocked her family and friends, who considered the attempted assaults completely out of character. App. 111–15. A doctor performed a mental health evaluation and concluded that petitioner was "not likely to recidivate." App. 117. In the doctor's view, petitioner was "unable to control behavior she knew was wrongful" because she was suffering from an "intense level of anxiety and depression." *Id.*

Domestic disputes resulting from marital infidelities and culminating in a thumb burn are appropriately handled by local law enforcement authorities. Petitioner's conduct likely violates one or more Pennsylvania statutes, including statutes that criminalize simple assault, *see* 18 Pa. Cons. Stat. § 2701, aggravated assault, *see id.* § 2702, and harassment, *see id.* § 2709. Petitioner accepted full responsibility for her actions and, under state law, likely would have faced a prison sentence of 3 to 25 months.

Instead of allowing local law enforcement to handle this domestic dispute, however, federal prosecutors opted for a novel, heavy-handed approach and charged petitioner with violations of, *inter alia*, 18 U.S.C. § 229(a)(1), a statute designed to implement the United States' treaty obligations under the 1993 Chemical Weapons Convention. App. 146–61.

B. The Convention And Implementing Legislation

The Chemical Weapons Convention is an international arms-control agreement that is intended to address the proliferation of weapons of mass destruction by outlawing the production, stockpiling, and use of chemical weapons. App. 146–61. The treaty requires signatory states to pledge never to develop or use chemical weapons, to destroy any existing stockpiles, and to avoid militarizing chemicals or using riot control agents as a method of warfare. App. 148. The treaty reinforces the 1924 Geneva Protocol prohibiting chemical and biological warfare and "belongs to the category of instruments of international law that prohibit weapons deemed particularly abhorrent." ICRC Advisory Serv. on Int'l Humanitarian Law, *Fact Sheet: 1993 Chemical Weapons Convention* (2003), *available at* http://www.icrc.org/web/eng/siteeng0.nsf/html/57JR8F.

Article I of the treaty requires signatory states "never under any circumstances" to use, develop, or stockpile chemical weapons or engage in military preparations to use chemical weapons. App. 148. Articles II and IV establish an elaborate reporting and verification process, requiring signatory states to destroy any chemical weapon stockpiles, and to set up

inspection and monitoring processes to be conducted by an international organization based in The Hague, Netherlands. App. 149–59. In conjunction with these other provisions, Article VII prohibits individuals from engaging in activities that would violate the Convention if undertaken by signatory states. App. 160–61. That provision does not, however, seek to interfere with signatory states' internal constitutional processes. The treaty mandates that each state "shall, *in accordance with its constitutional processes*, adopt the necessary measures to implement its obligations," including "enacting penal legislation" to ensure that no "natural and legal person[] anywhere on its territory or in any other place under its jurisdiction" undertakes "any activity" prohibited to the signatory state. App. 160 (emphasis added).

The U.S. Senate ratified the Convention in April 1997 and, because it is not self-executing, Congress passed implementing legislation. *See* Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–856, *codified at* 22 U.S.C. § 6701; Executive Order 13128, 64 Fed. Reg. 34,702 (June 28, 1999). Congress established criminal and civil penalties for statutory violations. *See* 18 U.S.C. §§ 229 *et seq.* The criminal provisions make it unlawful for any person "knowingly" to "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." *Id.* § 229(a)(1).

While the statutory provisions largely track the Convention, they go further in some respects. For example, the statute prohibits possessing or threatening to use chemical weapons, while the

Convention does not. The statute defines "chemical weapon" broadly to mean any "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter." *Id.* § 229F(1)(A). "Toxic chemical[s]" are thus presumptively swept into the definition of "chemical weapon[s]" unless they are intended for a non-prohibited purpose. In turn, the statute broadly defines "toxic chemical" to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* § 229F(8)(A).

In light of the broad sweep of the term "toxic chemicals," the key to the statute's definitional coverage is the extent of purposes "not prohibited under this chapter." *Id.* § 229F(1)(A). That phrase cuts back on the presumptive classification of every toxic chemical as a chemical weapon and, properly interpreted, would prevent countless household cabinets from being full of potential "chemical weapons." The Convention makes clear that a toxic chemical is "intended for purposes not prohibited" and, therefore, does not qualify as a "chemical weapon" when it is used for "industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." App. 149, 152. The statute contains the same exclusion in a slightly different formulation: A toxic chemical does not qualify as a chemical weapon if it is used for "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." 18 U.S.C. § 229F(7)(A).

Unlike other federal statutes that address assaultive conduct, the statute includes no

requirement that the alleged assault occur within the special jurisdiction of the United States, that the assault impact interstate commerce, that the victim have a recognized federal status, or that some other legitimate federal interest be involved. *See, e.g.*, 18 U.S.C. §§ 111–15, 1951, 2111, 2113, 2114, 2332a. Nor does it include any requirement that the government prove a federal interest as an element of the offense. *See* App. 54–55. Moreover, consistent with Congress' intent to criminalize activities implicating a major international treaty, the statute carries substantial penalties and unusual restrictions, such as a prohibition on release pending appeal. *See* 18 U.S.C. § 3143(b)(2); *id.* § 3142(f)(1)(A); *id.* § 2332b(g)(5)(B)(i). The statute makes a defendant eligible for the death penalty and requires a sentence of no less than life in prison where "the death of another person is the result" of a statutory violation. *Id.* § 229A(a)(2).

C. Procedural History And This Court's Earlier Decision

Petitioner's assault did not involve stockpiling chemical weapons, engaging in chemical warfare, or undertaking any of the activities prohibited to state signatories under the Chemical Weapons Convention. Nonetheless, the United States decided to prosecute her under 18 U.S.C. § 229 and, in late 2007, a grand jury returned an indictment. The indictment charged petitioner with two counts of knowingly possessing a chemical weapon that is "a toxic chemical" not intended "to be used for a peaceful purpose" within the meaning of 18 U.S.C. § 229F(7)(A).

In proceedings before the district court, petitioner moved to dismiss, arguing that as applied to her section 229 exceeded Congress' enumerated powers, invaded the powers reserved to the States by the Tenth Amendment, and impermissibly criminalized conduct that lacked a nexus to any legitimate federal interest. App. 55. Petitioner also initially challenged the statute as exceeding Congress' power under the Commerce Clause, App. 3–4, but in response the government disclaimed any reliance on the Commerce Clause, App. 4 n.1. As a result, the litigation focused on Congress' power to implement treaties and the Tenth Amendment.

In November 2007, the district court denied petitioner's motions. App. 84. It held that applying section 229 to this local, domestic dispute did not impinge on principles of federalism because the statute "was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution" to "comply with the provisions of a treaty." App. 75. Petitioner entered a conditional guilty plea but reserved her right to appeal. App. 89–90. The district court then sentenced petitioner to six years in prison, with five years of supervised release, and ordered her to pay a $2,000 fine and $9,902.79 in restitution. *See* App. 52.

Petitioner timely appealed and, in September 2009, the court of appeals affirmed without resolving petitioner's constitutional objections. *See* App. 48. The court recognized that the constitutional arguments pressed by petitioner raised difficult issues of "first impression" and noted that significant debate exists over the "scope" of *Missouri v. Holland*. App. 57. Instead of reaching the merits of

petitioner's constitutional challenge, however, the court accepted the government's argument that petitioner lacked standing.

This Court granted certiorari and reversed. *See Bond*, 131 S. Ct. 2355. Although the government had argued in the court below that petitioner lacked standing, it confessed error and urged this Court to adopt a new, bifurcated test for Tenth Amendment standing. In light of the government's confession of error, this Court appointed an amicus who argued that private parties lack standing to challenge legislation designed to implement treaties. *See* Br. of Amicus at 38–42, *Bond v. United States*, No. 09-1227 (Jan. 20, 2011). Although the argument focused on standing questions, the Court elicited answers from the government that underscored the breadth of its theory on the merits. *See* Tr. of Oral Argument at 29–31, *Bond v. United States*, 131 S. Ct. 2355 (2011) (No. 09-1227), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/09-1227.pdf

The Court rejected both the government's bifurcated test and the amicus' treaty power argument and ruled in petitioner's favor. It held that she had standing to challenge her conviction because "[f]ederalism secures the freedom of the individual" in addition to preserving the sovereignty of the States. *Bond*, 131 S. Ct. at 2364. As the Court explained, federalism "allows local policies 'more sensitive to the diverse needs of a heterogeneous society,' permits 'innovation and experimentation,' enables greater citizen 'involvement in democratic processes,' and makes government 'more responsive by putting the States

in competition for a mobile citizenry.'" *Id.* (citation omitted). Federalism's benefits "protect[] the liberty of all persons within a State" and thus afford citizens "a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable." *Id.*

D. The Decision On Remand

On remand, the Third Circuit recognized that, as interpreted by the government, the statute's "breadth" is "striking." App. 10 n.7. It also viewed the government's decision to employ a statute "designed to implement a chemical weapons treaty" to "deal with a jilted spouse's revenge on her rival" as, "to be polite, a puzzling use of the federal government's power." App. 35 n.20. The court nonetheless refused to interpret the statute to avoid constitutional doubt and, believing itself bound by dictum in *Holland*, affirmed petitioner's conviction.

The Third Circuit first concluded that the statute unambiguously applies to petitioner's conduct and rejected petitioner's effort to construe the statute to avoid turning every "kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." App. 10 n.7. The court rejected petitioner's suggestion that it follow the lead of this Court's precedents requiring a "plain statement" when Congress seeks to interfere with traditional state prerogatives or to change the federal-state balance in the prosecution of crimes. *Jones v. United States*, 529 U.S. 848, 858 (2000); *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991). It also failed to note

the many authorities cited by petitioner establishing that Congress did not intend the statute to reach non-warlike conduct—*i.e.*, conduct that would not violate the Convention if undertaken by signatory states. Instead, the court held that the statute's language speaks "with sufficient certainty" that only one interpretation was permissible. App. 12.

The Third Circuit then considered the constitutionality of 18 U.S.C. § 229 as applied to petitioner's conduct. App. 12–20. The court resolved that question by concluding, first, that the statute in general is rationally related to a valid treaty and, second, that under dictum in *Holland* "there can be no dispute about the validity of [a] statute that implements a valid treaty." App. 20. The court thus brushed aside concerns that, as applied to petitioner, section 229 goes far beyond what is necessary to implement the Chemical Weapons Convention and intrudes on matters of traditional state concern. That a failure to reach petitioner's conduct would not put the United States in violation of its treaty obligations was deemed immaterial. So too was the fact that state-law prohibitions and prosecutions could fully discharge any treaty obligation. Because the treaty was valid and the legislation rationally related to the treaty, further constitutional inquiry was foreclosed by the Third Circuit's reading of *Holland*.

The court held that, under *Holland*, "principles of federalism will ordinarily impose *no limitation* on Congress's ability to write laws supporting treaties, because the only relevant question is whether the underlying treaty is valid." App. 6–7 (emphasis added). The court interpreted *Holland* to hold "that

Congress may ... legislate to implement a valid treaty, regardless of whether Congress would otherwise have the power to act or whether the legislation causes an intrusion into what would otherwise be within the state's traditional province." App. 14. Taking this reasoning to its logical conclusion, the court stated that "the arguable consequence of *Holland* is that treaties and associated legislation are simply not subject to Tenth Amendment scrutiny, no matter how far into the realm of states' rights the President and Congress may choose to venture." App. 17.

The court of appeals was not comfortable with the implications of its holding, but viewed itself as bound by *Holland*. The court also recognized tension between its reading of *Holland* and this Court's "renewed attention on federalism over the last two decades." App. 19 n.10. And it expressed concern about the implications of its position in light of the virtually unlimited range of subjects addressed by modern treaties: "Juxtaposed against increasingly broad conceptions of the Treaty Power's scope, reading *Holland* to confer on Congress an unfettered ability to effectuate what would now be considered by some to be valid exercises of the Treaty Power runs a significant risk of disrupting the delicate balance between state and federal authority." App. 18–19. With considerable understatement, the court noted that "it may well be worth taking seriously" the notion that "judicial review" of treaty-implementing legislation should "be undertaken to preserve the federal structure of our government." App. 33 n.18. The court also recognized that its bright-line interpretation "may be viewed as

simplistic." App. 33. But it believed itself bound: "If there is nuance" in *Holland* "that has escaped us, it is for" this Court "to elucidate." *Id.* "[I]t may be that there is more to say about the uncompromising language used in *Holland* than we are able to say." App. 31. The court of appeals thus left it to this Court to "clarify whether principles of federalism have any role in" this context. App. 33 n.18.

Judges Rendell and Ambro each filed separate concurrences. In Judge Rendell's view, there is no "principle" that limits the scope of treaty-implementing legislation in our "system of dual sovereignty." App. 41.

Judge Ambro, by contrast, had serious reservations about the court's decision and "wr[o]te separately to urge the Supreme Court to provide a clarifying explanation of" *Holland*. App. 45. Noting the vigorous "academic debate" over *Holland*, Judge Ambro voiced concern that courts have interpreted *Holland* as granting the federal government "a blank check" and, absent this Court's review, the federal government would possess an "acquirable police power" antithetical to "the fundamental principle" that our federal government is one of few and defined powers. App. 45 & n.1. As Judge Ambro further explained, "if ever there were a statute that did test" limits on federal power, "it would be Section 229. With its shockingly broad definitions, Section 229 federalizes purely local, run-of-the-mill criminal conduct." *Id.* Section 229 provides "a troublesome example of the Federal Government's appetite for criminal lawmaking," which is "in deep tension" with our Constitution's recognition of the States' primary authority to define and enforce criminal law. App. 46.

Judge Ambro thus expressed "hope" that this Court would "clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it." App. 46–47.

REASONS FOR GRANTING THE PETITION

The decision below candidly acknowledges a treaty power unchecked by the most fundamental structural limits of the Constitution and Our Federalism. While the decision, and especially Judge Ambro's concurrence, expressed substantial concerns about this "acquirable police power," the court of appeals viewed itself as bound by *Holland*. In these circumstances, only this Court can clarify that the treaty power, like every enumerated power granted to the federal government, remains subject to the basic structural limits of the Constitution. Indeed, the decision below warrants this Court's review for at least three reasons. *First*, the panel's separate opinions encapsulate the significant, well-recognized confusion in the lower courts over the scope and continuing validity of *Holland*. *Second*, the decision below misconstrues this Court's precedent in *Holland* and is directly at odds with more recent decisions enforcing the Constitution's structural limits on federal authority. *Third*, the question presented raises an especially important and recurring issue. The prospect of an "acquirable police power" is, indeed, antithetical to fundamental tenets of our federal government of few and defined powers. The Framers did not grant the Senate and the President the authority to expand Congress' limited and enumerated powers based on negotiations with foreign governments. Given the virtually unlimited

scope of modern treaties and the central government's seemingly insatiable appetite for the federalization of traditional state crimes, the importance of the decision below is obvious. The Court should accept the lower court's request to clarify the scope of the federal government's authority to criminalize purely local conduct when seeking to implement treaties.

I. *Missouri v. Holland* And The Contours Of The Treaty Power Are Sources Of Great Confusion Among The Lower Courts.

Nearly a century ago this Court suggested in a single sentence of dictum that the Constitution imposes no limits on Congress' power to enact legislation to implement a valid treaty. Lower courts have struggled ever since to reconcile that seemingly boundless power with the Constitution's structural protections and the principle of enumerated powers. As this Court has reasserted the importance of federalism and the limits of Congress' enumerated powers, the confusion in the lower courts and the need for this Court's review has grown more acute.

The three opinions below reflect the divergent views within the lower courts and the recognized need for this Court's further guidance. Writing for all three members of the panel, Judge Jordan declared the Third Circuit "bound to take at face value" *Holland*'s statement that, "[i]f the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." App. 27, 36 (citing *Holland*, 252 U.S. at 432). Reading that single sentence without implicit qualifications, contextual limitations, or room

for lower court interpretation, Judge Jordan concluded that "the *only* relevant question is whether the underlying treaty is valid." App. 6–7 (emphasis added). The universe of structurally invalid legislation implementing a valid treaty was viewed as a null set.

Notwithstanding that striking conclusion, the Third Circuit was hardly sanguine about the consequences of its sweeping reading of *Holland*. As the court recognized, to "confer on Congress an unfettered ability to effectuate" any valid treaty, and to combine that power with "increasingly broad conceptions of the Treaty Power's scope," "runs a significant risk of disrupting the delicate balance between state and federal authority" and creates serious tension with this Court's "renewed attention on federalism over the last two decades." App. 18–19 & n.10. The court conceded that when *Holland* was decided a much narrower view of the treaty power held sway and questioned whether "the *Holland* court would have spoken in the same unqualified terms had it foreseen the late Twentieth Century's changing claims about the limits of the Treaty Power." App. 29. The court thus acknowledged that there may be "more to say about the uncompromising language used in *Holland* than we are able to say," and suggested that this Court should "clarify whether principles of federalism have any role" to play in this context. App. 31 & n.18.

Although she joined the court's opinion, Judge Rendell was markedly less concerned about the implications of the panel's "uncompromising" reading of *Holland* and wrote separately to embrace it wholeheartedly. In Judge Rendell's view, an "appeal

generally to federalism" is not "a workable principle that would limit the federal government's authority." App. 42–43. While Judge Rendell recognized this Court's contrary holdings in cases such as *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), she viewed those principles as limited to commandeering claims. App. 41.

Judge Ambro also wrote separately but, in stark contrast to Judge Rendell, expressed his deep reservations over the implications of the opinion he felt compelled to join. As he explained, the Third Circuit's reading of *Holland* creates "a blank check" for Congress "to enact any laws that are rationally related to a valid treaty." App. 45. This "acquirable police power ... run[s] counter to the fundamental principle that the Constitution delegates powers to the Federal Government that are 'few and defined.'" *Id.* (quoting The Federalist No. 45 (Madison)). Noting section 229's "shockingly broad" scope and its *coverage* of "purely local, run-of-the-mill ... conduct," Judge Ambro viewed the statute as "a troublesome example of the Federal Government's appetite for criminal lawmaking" that "test[s] the outer bounds of [Congress'] treaty-implementing authority" and is "in deep tension with" the Constitution's "important structural feature[s]." App. 45–47. Judge Ambro thus "urge[d]" this Court to reconsider *Holland* and to "clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it." App. 45, 47.

Judge Ambro is not alone in struggling to reconcile an expansive reading of *Holland* with the

basic structural protections inherent in the Constitution and explicit in this Court's more recent jurisprudence. Indeed, in contrast to the Third Circuit's approach, other courts of appeals have recognized that legislation implementing treaties is not exempt from the Constitution's structural protections. While some of those courts have found limits in the power to make treaties, and others in the power to implement them, each has recognized that "[f]idelity to principles of federalism," *Bond*, 131 S. Ct. at 2364, compels a conception of those powers that does not render the Constitution's structural protections a dead letter.

For example, the Ninth Circuit has concluded that "treaty provisions which create domestic law" and "have the same effect as legislation" must be "subject to the same substantive limitations as any other legislation." *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1309 (9th Cir. 1982). A fortiori, legislation implementing such treaty provisions must be so as well. "Were this not so," the court reasoned, "a constitutional limitation on governmental power could be circumvented by means of a treaty, although the same objective could not be accomplished through legislation." *Id.* As a result, the Ninth Circuit concluded that "there are ends which may not be accomplished either by statute or by treaty, however compelling the foreign policy interests may be." *Id.*; *see also Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth.*, 651 F.2d 800, 813 n.20 (1st Cir. 1981).

For largely the same reasons, the D.C. Circuit has rejected the view that *Holland* means "there is no apparent limit to what may be done under the treaty

power." *Power Auth. v. Federal Power Comm'n*, 247 F.2d 538, 542 (D.C. Cir. 1957), *vacated sub nom. Am. Pub. Power Ass'n v. Power Auth.*, 355 U.S. 64 (1957). Emphasizing that (at that time) no court had ever said "that the treaty power can be exercised without limit to affect matters which are of purely domestic concern," the court expressed "grave doubt" about the constitutionality of using "the treaty-making power to deal with ... matters which normally and appropriately were within the local jurisdiction of the States." *Id.* at 543.

The Fourth Circuit has also concluded that, because "treaty obligations cannot justify otherwise unconstitutional government conduct," the government "must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution." *Plaster v. United States*, 720 F.2d 340, 348 (4th Cir. 1983). In the same vein, the D.C. Circuit has noted that it cannot "be doubted that our Nation's *performance* as well as its making of international compacts must observe constitutional mandates." *Holmes v. Laird*, 459 F.2d 1211, 1217 (D.C. Cir. 1972) (emphasis added).

In contrast, the Second and Eleventh Circuits have employed a sweeping reading of *Holland* akin to that adopted by the Third Circuit. Upholding a statute implementing the International Convention Against the Taking of Hostages, those decisions rely on reasoning that directly parallels the Third Circuit's reasoning here: "If the Hostage Taking Convention is a valid exercise of the Executive's treaty power, there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause." *United*

States v. Lue, 134 F.3d 79, 84 (2d Cir. 1998) (citing *Holland*, 252 U.S. at 432); *accord United States v. Ferreira*, 275 F.3d 1020, 1027–28 (11th Cir. 2001).

Like Judge Rendell, the Second Circuit has concluded that, at most, the Constitution demands only a loose connection between a valid treaty and an implementing statute. *See Lue*, 134 F.3d at 84 (finding it sufficient that statute "bears a rational relationship to the Convention"). The Second Circuit dismissed the grave federalism concerns that such a rule creates by declaring the treaty-implementing power "not subject to meaningful limitation under the terms of the Tenth Amendment." *Id.* at 85.

Confusion over the meaning and wisdom of this Court's dictum in *Holland* is hardly limited to the courts of appeals. Scholars, too, have long debated the "scope and persuasiveness" of *Holland*, App. 45, with many echoing Judge Ambro's plea that this Court revisit it. *See, e.g.*, Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867, 1868 (2005); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403, 415–23 (2003) (arguing that *Holland* must be understood in light of this Court's more recent federalism jurisprudence); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390 (1998); *see also* App. 45 n.1 (collecting articles). Indeed, even the federal government has recognized that *Holland* cannot possibly mean what the Third Circuit thinks it means. *See* Tr. of Oral Argument at 31:21–32:04, *Golan v. Holder*, 132 S. Ct. 873 (2012) (No. 10-545) ("I do not think a treaty can expand the powers of the federal government.") (Argument of Solicitor General).

It has been nearly a century since this Court set forth arguably "[t]he most important sentence in the most important case about the constitutional law of foreign affairs." Rosenkranz, 118 Harv. L. Rev. at 1868. And in the course of that century, lower courts have become increasingly confused as to the meaning of that sentence and the limits, if any, it allows on the proper scope and application of treaty-implementing legislation. As this Court has reasserted the limits on Congress' enumerated powers and the subject matter of international treaties has expanded, the importance of this "uncompromising" sentence has only grown. The Court should grant review to provide the lower courts with much-needed guidance on what that sentence means.

II. The Decision Below Cannot Be Reconciled With The Constitution's Structural Protections Or With This Court's Precedent.

As this Court reiterated the last time this case was before it, "[b]y denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct. at 2364. The Court unanimously concluded that "an individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States," and remanded for consideration of petitioner's argument that section 229, as applied here, is one such law. *Id.* at 2364, 2367. The Court rejected amicus' invitation to adopt a special rule for the Treaty Clause. Nonetheless, the court of appeals interpreted *Holland* to require an exception for legislation enacted to implement a treaty: let the treaty be valid, and any legislation

enacted to rationally further the treaty must also be valid, no matter how inconsistent with our baseline assumptions about the proper and properly limited role of the federal government. That is not and cannot be the law.

This Court has recognized that many treaties are non-self-executing and that in some circumstances it is state and local officials who must ensure compliance with our international obligations. In light of those realities, there is absolutely no reason to assume that any federal legislation enacted to implement a valid treaty is automatically valid. Nor is there any reason to think that the Senate and President can reconfigure the most basic structural safeguards in our federal system by reaching an agreement with a foreign government. As Judge Ambro correctly observed, the notion of an "acquirable police power" is antithetical to our founding document and basic constitutional structure. App. 45. But despite its expressed doubts about the wisdom of this constitutional rule, the court below viewed its hands as tied by *Holland*. It is thus clear that only this Court can clarify the confusion and confirm the correct constitutional rule.

A. The Decision Below Misinterprets *Missouri v. Holland* And Adopts A Rule Inconsistent With More Recent Precedents.

According to the Third Circuit, a single sentence in *Holland* amounts to a wholesale "rejection of federalism as an applicable concept as far as [valid] treaties are concerned." App. 36 n.21. That is a rather remarkable consequence to attribute to a

single sentence of dictum. A careful review of *Holland* makes clear that this sentence cannot carry the weight attributed to it by the Third Circuit. Equally important, such a reading would conflict with more recent precedents, not to mention with the Constitution itself.

Holland involved a facial challenge to the Migratory Bird Treaty Act of 1918, *codified* at 16 U.S.C. §§ 703–12. Missouri contended that the statute violated the Tenth Amendment because it interfered with the State's sovereign right to regulate the killing of migratory bids within its territory. 252 U.S. at 430–31. In rejecting that argument, the Court applied "established rules," *id.* at 435, and did not purport to overturn earlier cases holding that Congress' legislative authority cannot "be enlarged under the treaty-making power." *Mayor of New Orleans v. United States*, 35 U.S. 662, 736 (1836); *see also Holden v. Joy*, 84 U.S. 211, 243 (1873) (treaty power must be exercised consistently "with the nature of our government and the relation between the States and the United States"). To the contrary, the Court simply rejected the argument that in answering the question before it favorably to the State "it is enough to refer to the Tenth Amendment." *Holland*, 252 U.S. at 432. And it is in the context of rejecting that extreme position that the dictum in the next sentence must be understood.

Nor did *Holland* treat federalism as irrelevant to the inquiry; quite the contrary, the Court carefully balanced the relevant state (which it viewed as *de minimis*) and national (which it deemed paramount) interests. *See id.* at 435 (balancing "slender reed" of State's pecuniary interest in migratory birds only

temporarily in the State against "national interest of very nearly the first magnitude").

That could not be further from the facts of this case. Here, the state interest in policing garden-variety crimes is paramount, and the federal interest in treaty-compliance non-existent. Applying section 229 to petitioner's conduct marks a radical intrusion into the State's sovereign prerogative to administer "private justice between" its citizens and to determine the appropriate punishment for local crimes. The Federalist No. 17, at 118 (Hamilton) (Clinton Rossiter ed., 1961); *Montana v. Engelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion) ("preventing and dealing with crime is ... the business of the States" (alteration and internal quotations omitted)). By contrast, petitioner's conduct does not implicate the concerns of the Convention at all and, in any event, the fact that Pennsylvania prohibits the conduct would fully satisfy any treaty obligations.

Moreover, unlike the State in *Holland*, petitioner is not arguing that federal regulation of chemical weapons impermissibly intrudes on state sovereignty. A non-self-executing convention addressing that subject—especially one that provides for implementation by signatories consistent with their respective constitutional systems—is neither invalid nor the source of the constitutional problem. The problem here is precisely that Congress, rather than implementing the treaty consistent with our constitutional system of federalism, enacted a statute that, if construed to apply to petitioner's conduct, would violate basic structural guarantees and exceed Congress' enumerated powers.

Under those circumstances, it makes no sense to conclude that just because the treaty itself is a valid exercise of the treaty power that any legislation rationally related to it is necessarily consistent with the basic structural provisions of our Constitution. As this Court recognized in *Medellin v. Texas*, 552 U.S. 491 (2008), many treaties are non-self-executing and demand subsequent action by the federal *or* state and local governments. As *Medellin* dramatically demonstrates, the validity of a non-executing treaty and the federal action that purports to implement it are distinct questions. *Medellin* invalidated the latter while assuming the validity of the former. Equally important, there is nothing anomalous about the federal government entering a valid treaty that depends on state officials or state laws for compliance. Here, Pennsylvania laws criminalizing petitioner's conduct fully discharged any treaty obligation the United States had to criminalize her conduct. Having vindicated federalism principles in *Medellin* even though it put the United States into irrevocable breach of its treaty obligations, it would be more than passing strange to ignore federalism limits when Pennsylvania's exercise of its police power to criminalize garden-variety poisoning eliminated any possibility of breach.

The Third Circuit's reading of *Holland* is also incompatible with this Court's more recent emphasis that federal laws cannot be "enacted in contravention of constitutional principles of federalism." *Bond*, 131 S. Ct. at 2365; *see also NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). The Third Circuit viewed legislation enacted pursuant to the treaty power as fundamentally different. But legislation enacted to

implement a treaty must be a valid exercise of either some specific enumerated power or the Necessary and Proper Clause. To be valid under the latter authority, legislation must be both necessary *and* proper. Legislation that fails to respect the basic structural provisions of the Constitution is not "proper" within the meaning of the Necessary and Proper Clause. *See Printz*, 521 U.S. at 924; *accord NFIB*, 132 S. Ct. at 2623–24 (Roberts, C.J.).

Clearly, legislation designed to implement a valid treaty—no less than any other legislation—would need to respect the basic structural prohibition on commandeering state officials. But there is no reason to adopt a different rule when it comes to the other structural limits on the federal government. This Court has already concluded that "[i]mpermissible interference with state sovereignty is not within the enumerated powers of the National Government." *Bond*, 131 S. Ct. at 2366. There is no exception to that rule for statutes implementing a treaty. *See Reid v. Covert*, 354 U.S. 1, 16–18 (1957) (plurality opinion) (holding that federal government may not exploit treaty power to circumvent Bill of Rights).

Finally, and most fundamentally, the Third Circuit's reading of *Holland* would give the President and the Senate the opportunity to expand Congress' powers based on an agreement with a foreign nation. As Justice Scalia colorfully observed, "powers that Congress does not have under the Constitution can[not] be obtained by simply obtaining the agreement of the Senate, the President and Zimbabwe. I don't think that a treaty can expand the powers of the Federal Government." *Golan*, Tr. of Oral Argument at 32:21–33:1. While the Solicitor

General professed his "complet[e] agreement," *id.* at 33, the Third Circuit is in complete disagreement based on its reading of *Holland*. Its notion of "acquirable police powers" is fundamentally at odds with basic notions of federalism and clearly merits this Court's review.

B. The Decision Below Misapplies Basic Principles Of Statutory Construction.

The Third Circuit's approach is particularly troubling because there was no need for it to construe the statute to reach the wholly domestic conduct at hand, or to reach the thorny constitutional question of the scope of Congress' treaty-implementing power. Given the grave constitutional concerns raised by the government's "shockingly broad" interpretation of section 229, it was incumbent on the Third Circuit to consider whether the statute can be construed to avoid those concerns. *See, e.g.*, *Jones*, 529 U.S. at 850; *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Gregory*, 501 U.S. at 460–61 ("plain statement rule"); *Skilling v. United States*, 130 S. Ct. 2896, 2933 (2010) (rule of lenity). As petitioner explained, the statute is reasonably susceptible to a common-sense limiting construction that would avoid unintended applications like this one. If the court of appeals had applied this Court's approach in *Jones* (and these other cases), it would have invalidated the conviction on statutory grounds and avoided the constitutional thicket of *Holland* altogether.

The statute defines "chemical weapon[s]" to include "toxic chemicals," "except where intended for a purpose not prohibited under this chapter." 18

U.S.C. § 229F(1)(A). "Toxic chemical[s]" are in turn defined expansively to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* § 229F(8)(A). As the Third Circuit acknowledged, absent some limiting principle, the statute's broad definition of toxic chemical would turn every kitchen cupboard in the country "into a potential chemical weapons cache." App. 10 n.7. Indeed, as Justice Alito memorably remarked at oral argument, the government's interpretation would treat vinegar as a chemical weapon when deployed on a neighbor's goldfish. *Bond*, Tr. of Oral Argument at 29:15–30:9. Fortunately, the statute need not be read so broadly. The statute excludes from the presumptively inclusive sweep of toxic chemicals those included for "[a]ny peaceful purpose." 18 U.S.C. § 229F(7)(A). When read in the context of Congress' objective in implementing the Convention and the background rules counseling against unconstitutional applications that upset the federal-state balance, a saving construction is clearly possible.

The meaning of statutory language is "determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). The point of section 229 is to prohibit conduct by private parties that would violate the Convention if undertaken by signatory states, not to prohibit every conceivable malicious use of readily available chemicals. When the Convention exempts chemicals intended for peaceful, non-military uses, it addresses

intent at a broad level, such that chemicals generally intended for peaceful uses are not chemical weapons, even if they are capable of diversion for a different use. But if that prohibition is applied to individuals without subtlety, it risks turning every diversion of common household chemicals into the deployment of chemical weapons, instead of what it is, namely, a matter for local law enforcement. Given the Convention's overarching purpose, interpreting the statute to reach conduct in which no signatory state could possibly engage—such as the diversion of useful chemicals to try to injure a romantic rival—is unnecessary and unintended.

The key to giving the statute a reasonable and common-sense scope is Congress' exclusion of toxic chemicals intended for "[a]ny peaceful purpose." 18 U.S.C. § 229F(7)(A). The Third Circuit insisted that this language must be interpreted broadly and consistent with its "commonly understood meaning." App. 11. But in its most traditional sense—and the one most relevant to the context of agreements between nation-states—"peaceful" means non-warlike. *See* Shorter Oxford English Dictionary 2128–29 (5th ed. 2002); The American Heritage College Dictionary 1005 (3d ed. 1997). Alternatively, if purpose is considered more broadly than the individual defendant's use, the diversion of chemicals clearly intended for peaceful uses could remain the province of state and local law enforcement.

Reading "peaceful purposes" to exclude conduct that is outside the intended scope of the Convention also avoids potentially unconstitutional and unintended applications of the statute—for instance, provisions requiring "destruction" and "coercive

verification" of chemical weapons make no sense if common household chemicals become "chemical weapons" whenever used with malicious intent. *See McNeill v. United States*, 131 S. Ct. 2218, 2223 (2011) (absurd results should be avoided).

Petitioner's actions may have been malicious, but they are not warlike and they are not sensibly covered by a statute designed to prohibit warlike conduct. Indeed, any other conclusion trivializes the concept of chemical weapons and the serious international problem at which the Convention is aimed. When confronted with similar federal incursions on the States' police power, this Court has readily adopted comparable narrowing constructions. *See, e.g., Jones*, 529 U.S. at 850 (construing arson statute not to "render the 'traditionally local criminal conduct' in which" defendant had engaged "a matter for federal enforcement"). If the Third Circuit had adopted the approach of *Jones* it would have invalidated petitioner's conviction and avoided the need to address difficult constitutional questions.

III. The Question Presented Raises Constitutional Issues Of Paramount Importance.

The intersection between principles of federalism and the treaty power raises constitutional questions of the first order. Indeed, the need to enforce constitutional restraints on the treaty power is all the more pressing as a result of two recent trends: (1) the expanding scope and number of international treaties, and (2) the ever-increasing federalization of criminal law. The intersection of those two trends in an unchecked "acquirable police power" threatens the

vitality of this Court's recent federalism jurisprudence and, as the court of appeals recognized, "runs a significant risk of disrupting the delicate balance between state and federal authority." App. 19.

Given the proliferation of treaties covering all manner of subjects, including those not traditionally thought of as matters of international concern, the Third Circuit's broad reading of *Holland* opens a loophole through which Congress can circumvent the limits on its enumerated powers. For example, this Court has held that the Commerce Clause does not empower Congress to criminalize purely local, non-economic activity. *See United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995). Nor does the Necessary and Proper Clause allow the commandeering of state and local officials, *see Printz v. United States*, 521 U.S. 898 (1997), and neither Clause allows the federal government to compel individuals to enter commerce, *see NFIB v. Sebelius*, 132 S. Ct. 2566 (2012). By the Third Circuit's reasoning, Congress could achieve those verboten results by purporting to enact such laws pursuant to any of the United States' rationally related treaty obligations, thereby effectively arrogating to itself the equivalent of a general police power. *See* Rosenkranz, 118 Harv. L. Rev. at 1871–72 (suggesting Violence Against Women Act invalidated in *Morrison* could be reenacted as implementation of International Covenant on Civil and Political Rights).

That concern is far from hypothetical in light of Congress' desire to federalize crimes traditionally addressed at the state and local levels. There is "no better example of the police power, which the

Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618. This division of authority makes sense: Federalization of criminal law puts unnecessary strains on the federal justice system while sapping the ability of States to "exercise discretion in a way that is responsive to local concerns." Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 Hastings L.J. 1135, 1173 (1995); *see also* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 646 (1997) (federalizing crimes can create "dramatically disparate treatment of similarly situated offenders, depending on whether they are prosecuted in federal or state court"). Members of this Court have thus "repeatedly argued against the federalization of traditional state crimes and the extension of federal remedies to problems for which the States have historically taken responsibility." *Morrison*, 529 U.S. at 636 n.10 (Souter, J., dissenting).

Nonetheless, the federal government's "appetite for criminal lawmaking" remains insatiable. App. 46 (Ambro, J); *see also, e.g.*, John C. Eastman, *The Outer Bounds of Criminal Law: Will Mrs. Bond Topple* Missouri v. Holland*?*, 2011 Cato. Sup. Ct. Rev. 185, 193 (2011); Edwin Meese, III, *Big Brother on the Beat: The Expanding Federalization of Crime*, 1 Tex. Rev. L. & Pol. 1, 3 (1997); John Panneton, *Federalizing Fires: The Evolving Federal Response to Arson Related Crimes*, 23 Am. Crim. L. Rev. 151 (1985). Section 229 typifies this overreach, at least arguably rendering an act as quintessentially local as pouring

a bottle of vinegar into a romantic rival's goldfish bowl a matter of federal concern. *See* p. 31, *supra*.

Indeed, the "shockingly broad" scope of section 229 (at least as interpreted by the federal government and Third Circuit) injects federal power into every household cleaning cabinet to the detriment of individual liberty and any sensible understanding of the federal-state balance. Under the government's view, every attempted poisoning—whether of a human or a neighbor's pet—and every assault using any toxic chemical, no matter how localized the dispute, is subject to federal prosecution under the heavy artillery of the Convention's implementing statute and its harsh penalties. That the government asserts such authority even though it concedes the relevant treaty does not even require it is all the more reason to fear the consequences of the Third Circuit's approach. Moreover, the decision below is particularly troubling given that violators of section 229 have committed a "Federal crime of terrorism." 18 U.S.C. § 2332b(g)(5). Left standing, petitioner's conviction is an invitation to abuse, as it offers federal prosecutors perverse incentives to pursue similar local crimes in hopes of securing easy "terrorism" convictions, even though such convictions do nothing to further the purpose of section 229 or the treaty it was intended to implement, let alone the global war against terrorism.

When Congress criminalizes conduct already "denounced as criminal by the States," it effects a "change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Enmons*, 410 U.S. 396, 411–12 (1973) (citation

omitted). Accordingly, federal crimes should be reserved for those crimes that implicate either a broader federal regulatory regime or an indisputable national interest. The Third Circuit's interpretation of section 229 as applying to every malicious use of chemicals departs from that principle and dramatically expands federal power in a quintessential area of state criminal law. Cases of poisoning were not unknown to the Framers, and the notion that these offenses, and the sensitive determination whether they warrant the death penalty, would be anything but a core concern for the States would have been unthinkable. The Third Circuit's conclusion that the States have lost that sovereign prerogative whenever a chemical agent—no matter how common—is used in a crime implicates state interests of the highest order. This Court's review is needed to eliminate this threat to "the integrity, dignity, and residual sovereignty of the States" and the individual liberty that the Constitution's division of powers was intended to protect. *Bond*, 131 S. Ct. at 2364.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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August 1, 2012

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2677

UNITED STATES OF AMERICA

v.

CAROL ANNE BOND,

Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. No. 07-cr-528)
District Judge: Honorable James S. Giles

Argued November 16, 2011

Before: RENDELL, AMBRO, and JORDAN,
Circuit Judges

PRECEDENTIAL
On Remand From the United States Supreme Court
(Filed: May 3, 2012)

OPINION OF THE COURT

JORDAN, *Circuit Judge.*

This case is before us on remand from the Supreme Court, which vacated our earlier judgment that Appellant Carol Anne Bond lacked standing to challenge, on Tenth Amendment grounds, her conviction under the penal provision of the Chemical Weapons Convention Implementation Act of 1998, 18 U.S.C. § 229 (the "Act"), which implements the 1993 Chemical Weapons Convention, 32 I.L.M. 800 (1993) (the "Convention"). The Supreme Court determined that Bond does have standing to advance that challenge, and returned the case to us to consider her constitutional argument.

In her merits argument, Bond urges us to set aside as inapplicable the landmark decision *Missouri v. Holland*, 252 U.S. 416 (1920), which is sometimes cited for the proposition that the Tenth Amendment has no bearing on Congress's ability to legislate in furtherance of the Treaty Power in Article II, § 2 of the Constitution. Cognizant of the widening scope of issues taken up in international agreements, as well as the renewed vigor with which principles of federalism have been employed by the Supreme Court in scrutinizing assertions of federal authority, we agree with Bond that treaty-implementing legislation ought not, by virtue of that status alone, stand immune from scrutiny under principles of federalism. However, because the Convention is an international agreement with a subject matter that lies at the core of the Treaty Power and because *Holland* instructs that "there can be no dispute about the validity of [a] statute" that implements a

valid treaty, 252 U.S. at 432, we will affirm Bond's conviction.

I. Factual Background and Procedural History

A. Facts

Bond's criminal acts are detailed in our prior opinion, *United States v. Bond*, 581 F.3d 128, 131-33 (3d Cir. 2009) ("*Bond I*"), and in the Supreme Court's opinion, *Bond v. United States*, 131 S. Ct. 2355, 2360-61 (2011) ("*Bond II*"), so we provide only a brief recitation here. Suffice it to say that, while Bond was employed by the chemical manufacturer Rohm and Haas, she learned that her friend Myrlinda Hanes was pregnant and that Bond's own husband was the baby's father. Bond became intent on revenge. To that end, she set about acquiring highly toxic chemicals, stealing 10-chlorophenoxarsine from her employer and purchasing potassium dichromate over the Internet. She then applied those chemicals to Hanes's mailbox, car door handles, and house doorknob. Bond's poisonous activities were eventually discovered and she was indicted on two counts of acquiring, transferring, receiving, retaining, or possessing a chemical weapon, in violation of the Act. She was, in addition, charged with two counts of theft of mail matter, in violation of 18 U.S.C. § 1708.

B. Procedural History

Bond filed a motion to dismiss the counts that alleged violations of the Act. She argued that the Act was unconstitutional, both facially and as applied to her. More particularly, she said that the Act violated

constitutional "fair notice" requirements, that it was inconsistent with the Convention it was meant to implement, and that it represented a breach of the Tenth Amendment's protection of state sovereignty. Emphasizing that last point, Bond contended that neither the Commerce Clause, nor the Necessary and Proper Clause in connection with the Treaty Power, could support the expansive wording of the statute, let alone her prosecution. (*See* App. at 59 (arguing that, "[g]iven the localized ... scope of the conduct alleged, ... application of 18 U.S.C. § 229 signals a massive and unjustifiable expansion of federal law enforcement into state-regulated domain").) The government's response has shifted over time,[1] but it has been consistent in maintaining that the Act is a constitutional exercise of Congress's authority to enact treaty-implementing legislation under the Necessary and Proper Clause. The District

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[1] The government has, at different stages of this case, been willing to jettison one legal position and adopt a different one, as seemed convenient. Before the District Court, it expressly disclaimed the Commerce Clause as a basis for Congress's power to approve the Act. (*See* E.D. Pa. No. 07-cr-528, doc. no. 30, at 7 ("Title 18, United States Code, Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties.").) The government still maintained that position the first time it appeared before us, relying only on the Necessary and Proper Clause in support of the Act's constitutionality. (*See* Appellee's Initial Br. at 20-32.) Once before the Supreme Court, however, the government decided that this is really a Commerce Clause case and that the position it had pressed before us is secondary. That change was in addition to abandoning the position on standing that it had previously taken. *See infra* note 2.

Court accepted that argument and denied Bond's motion to dismiss.

We affirmed on appeal, concluding that Bond lacked standing to pursue her Tenth Amendment challenge and that the Act was neither unconstitutionally vague nor unconstitutionally overbroad.[2] *Bond I*, 581 F.3d at 139. The Supreme Court granted certiorari to address the question of "[w]hether a criminal defendant convicted under a federal statute has standing to challenge her conviction on grounds that, as applied to her, the statute is beyond the federal government's enumerated powers and inconsistent with the Tenth Amendment." Petition for Writ of Certiorari, *Bond v. United States* (No. 09-1227), 2010 WL 1506717 at *i;

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[2] We determined that Bond lacked standing to pursue her Tenth Amendment challenge after requesting supplemental briefing on the question of whether she "ha[d] standing to assert that 18 U.S.C. § 229 encroaches on state sovereignty in violation of the Tenth Amendment to the United States Constitution absent the involvement of a state or its instrumentalities[.]" (*United States v. Bond*, No. 08-2677, 08/14/2009 Letter to Counsel.) The government responded that Bond lacked such standing under *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118 (1939), which held that "appellants, absent the states or their officers, have no standing ... to raise any question under the [Tenth] [A]mendment," *id.* at 144. (*United States v. Bond*, No. 08-2677, 08/20/2009 Letter from Appellee.) Before the Supreme Court, however, the government reversed course and argued that Bond did have standing to make a Tenth Amendment challenge. *See Bond II*, 131 S. Ct. at 2361 (describing the government's initial "position that Bond did not have standing" and the changed position before the Supreme Court that "Bond does have standing").

see Bond v. United States, 131 S. Ct. 455 (2010). Ultimately, the Court concluded that Bond "does have standing to challenge the federal statute." *Bond II*, 131 S. Ct. at 2360. The case was remanded to us to address the "issue of the statute's validity" which, as the Court instructed, "turns in part on whether the law can be deemed 'necessary and proper for carrying into Execution' the President's Article II, § 2 Treaty Power." *Id.* at 2367 (quoting U.S. Const. art. I, § 8, cl. 18).

II. Discussion[3]

In *Missouri v. Holland*, the Supreme Court declared that, if a treaty is valid, "there can be no dispute about the validity of the statute [implementing it] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government."[4] 252 U.S. at 432. Implicit in that statement is the premise that principles of federalism will ordinarily impose no limitation on Congress's ability to write laws supporting treaties, because the only relevant question is whether the

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[3] The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and review *de novo* a challenge to the constitutionality of a criminal statute, *Bond I*, 581 F.3d at 133.

[4] The referenced section of the Constitution is the Necessary and Proper Clause, which provides Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18.

underlying treaty is valid. *See id.* at 432, 434 (stating that "it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States" because the Treaty Power is delegated, but acknowledging the possibility that there may sometimes be "invisible radiation[s] from the general terms of the Tenth Amendment"). Reasoning that a reading of *Holland* that categorically rejects federalism as a check on Congress's treaty-implementing authority is of questionable constitutional validity, Bond asks us to invalidate her conviction because the Act is unconstitutional as applied to her.[5] She says that to

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[5] It appears that Bond has abandoned her facial challenge to the Act. Her argument, both in her supplemental briefing before us and at oral argument, is articulated as an as-applied challenge. (*See, e.g.*, Appellant's Supp. Br. at 26 ("Bond is raising a ... limited and narrowly focused as-applied challenge. She contends that, whatever its validity more generally, the statute cannot be constitutionally applied to her in the circumstances of this case."); Transcript of Oral Argument at 11-13, *United States v. Bond*, No. 08-2677 ("3d Cir. Argument").) And, Bond's counsel commented at oral argument that he was "trying ... [to be] respectful of the Supreme Court's jurisprudence that says you don't lightly bring a facial challenge" to a statute. (3d Cir. Argument at 62.) Counsel framed his argument as being that "the principle[] that [the statute has] offended is that if you apply it so broadly that it criminalizes every malicious use of poisoning, then you've overridden the structural limitations on the government and the division of power between the federal government and the states." (*Id.* at 15-16.) We thus take it as granted that, although some of her past arguments move into the territory of a facial challenge, Bond is not now saying that Congress was without power to pass the Act but is, instead, arguing that Congress could not properly pass it if the Act's language is interpreted in

hold otherwise would offend the Constitution's balance of power between state and federal authority by "intrud[ing] ... on the traditional state prerogative to punish assaults." (Appellant's Supp. Br. at 47.)

A. Constitutional Avoidance

Bond first argues, however, that we should avoid reaching the constitutional question by construing the Act not to apply to her conduct at all.[6]

Her avoidance argument begins with the text of the Act itself, which provides, in pertinent part, that "it shall be unlawful for any person knowingly ... to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. § 229(a)(1). The term "chemical weapon" is defined broadly to include any "toxic chemical and its precursors," *id.* § 229F(1)(A), and "[t]he term 'toxic chemical' means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to

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a way that reaches her conduct. In short, we are dealing with an as-applied, rather than a facial, challenge.

[6] Bond's constitutional avoidance argument necessarily presumes a serious constitutional problem, notwithstanding *Holland*. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (stating the constitutional avoidance inquiry should be undertaken in the face of "serious constitutional problems"). Regardless of *Holland*'s breadth, we accept Bond's suggestion that it is prudent to begin our analysis with the avoidance doctrine.

humans or animals," *id.* § 229F(8)(A). Congress did put some limit on the sweep of the Act by excluding from the definition of "chemical weapon" any chemicals and precursors "intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." *Id.* § 229F(1)(A). The phrase "purpose not prohibited under this chapter," is then defined, in part, as "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." *Id.* § 229F(7)(A). It is that "peaceful purpose" language that Bond urges us to take as our interpretive lodestar.

Specifically, Bond argues that, by looking to the "peaceful purpose" exception, we can employ a "common sense interpretation of § 229" that avoids "mak[ing] every malicious use of a household chemical"—including her own—a federal offense. (Appellant's Supp. Br. at 17.) All we need do is "interpret the statute ... to reach [only the kind of acts] that would violate the Convention if undertaken by a signatory state." (*Id.* at 14.) In other words, as Bond sees it, the modifier "peaceful" should be understood in contradistinction to "warlike" (3d Cir. Argument at 23), and, when so understood, the statute will not reach "conduct that no signatory state could possibly engage in—such as using chemicals in an effort to poison a romantic rival," as Bond did. (Appellant's Supp. Br. at 40.) That interpretation is tempting, in light of the challenges inherent in the Act's remarkably broad

language,[7] but, as we held the first time we had this case, Bond's behavior "clearly constituted unlawful possession and use of a chemical weapon under § 229." *Bond I*, 581 F.3d at 139.

That holding is in better keeping with the Act's use of the term "peaceful purpose" than the construction Bond would have us give it. The ordinary meaning of "peaceful" is "untroubled by conflict, agitation, or commotion," "of or relating to a state or time of peace," or "devoid of violence or force," *Merriam-Webster's Collegiate Dictionary* 852 (10th ed. 2002), and Bond's "deploy[ment of] highly toxic chemicals with the intent of harming Haynes," *Bond I*, 581 F.3d at 139, can hardly be characterized

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[7] The Act's breadth is certainly striking, seeing as it turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache. *Cf.* Transcript of Oral Argument at 29, *Bond v. United States*, 131 S. Ct. 2355 (2011) (No. 09-1227) (Justice Alito's statement during oral argument that "pouring a bottle of vinegar in [a] friend's goldfish bowl" could constitute the use of a chemical weapon under the Act and expose a person to years in federal prison). We observed as much the last time this case was before us, noting, as Bond had herself acknowledged at the time, that the Act's wide net was cast "for obvious reasons." *Bond I*, 581 F.3d at 139. Ultimately, however, we concluded that the Act was not unconstitutionally overbroad. *See id.* (observing that the Act is "certainly broad," but not unconstitutionally so). Bond did not challenge that determination, *see* Petition for Writ of Certiorari, *Bond v. United States* (No. 09-1227), 2010 WL 1506717 at *i, and it remains undisturbed. That the Act is not unconstitutionally overbroad, of course, does not preclude Bond from arguing, as she now does, that the Act offends the Constitution's division of power between the federal government and the states to the extent it is used to make her conduct a federal crime.

as "peaceful" under that word's commonly understood meaning, *cf. Jones v. United States*, 529 U.S. 848, 857-58 (2000) (interpreting the federal arson statute not to reach "traditionally local criminal conduct" since the statute was "susceptible of two constructions" (citation and internal quotation marks omitted)). The term "peaceful," moreover, does not appear in isolation: the Act only excludes from its ambit "peaceful purpose[s] ... related to *an industrial, agricultural, research, medical, or pharmaceutical activity or other activity*." 18 U.S.C. § 229F(7)(A) (emphasis added). Bond's attacks on Haynes—even if non-warlike—were certainly not "related to an industrial, agricultural, research, medical, or pharmaceutical activity." *Id.* Nor can her use of chemicals be said to be a "peaceful purpose[] ... related to an ... other activity," because regarding her assaultive behavior as such would improperly expand § 229F(7)(A)'s scope. *See, e.g., Gooch v. United States*, 297 U.S. 124, 129 (1936) ("The rule of ejusdem generis ... [o]rdinarily ... limits general terms which follow specific ones to matters similar to those specified.").

Thus, while one may well question whether Congress envisioned the Act being applied in a case like this, the language itself does cover Bond's criminal conduct. And, given the clarity of the statute, we cannot avoid the constitutional question presented. *See United States v. Stevens*, 130 S. Ct. 1577, 1591 (2010) (stating that only "'ambiguous statutory language [should] be construed to avoid serious constitutional doubts'" (alteration in original) (citation omitted)); *United States v. Locke*, 471 U.S. 84, 96 (1985) ("We cannot press statutory

construction 'to the point of disingenuous evasion' even to avoid a constitutional question." (quoting *George Moore Ice Cream Co. v. Rose*, 289 U.S. 373, 379 (1933))). It is not our prerogative to rewrite a statute, and we see no sound basis on which we can accept Bond's construction of the Act without usurping Congress's legislative role. Though we agree it would be better, if possible, to apply a limiting construction to the Act rather than consider Bond's argument that it is unconstitutional, *see Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case"), the statute speaks with sufficient certainty that we feel compelled to consider the hard question presented in this appeal.

B. Constitutionality of the Act as Applied

Understanding whether application of the Act to Bond violates the structural limits of federalism begins with the Tenth Amendment, which Bond cites and which provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. That text, as the Supreme Court has observed, "confirms that the power of the Federal Government is subject to limits that may ... reserve power to the States." *New York v. United States*, 505 U.S. 144, 157 (1992). Thus, it encapsulates the principles of federalism upon which our nation was founded. *See* D.A. Jeremy Telman, *A Truism That Isn't True? The Tenth Amendment and Executive War Power*, 51 Cath. U. L. Rev. 135, 143-44 (2001) (describing the argument that "the Tenth

Amendment has a declaratory function and provides a rule of constitutional interpretation rather than a rule of constitutional law").[8]

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[8] We do not need to determine whether the Tenth Amendment is a tautology reflecting the structural limitations on federal power embodied in the system of dual sovereignty established by the Constitution, or, as has sometimes been suggested, serves as an independent check on federal power. *See New York*, 505 U.S. at 156, 160 (describing the argument that, even when Congress has the authority to regulate, "the Tenth Amendment limits the power of Congress to regulate in the way it has chosen," though noting that its actual limit "is not derived from the text" of the Tenth Amendment as the Tenth Amendment is "essentially a tautology"); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 842 (1976) (recognizing a "limit[] upon the power of Congress to override state sovereignty, even when exercising its otherwise plenary powers ... which are conferred by Art. I of the Constitution" and that "an express declaration of this limitation is found in the Tenth Amendment"), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *cf.* Gerard N. Magliocca, *A New Approach to Congressional Power: Revisiting the Legal Tender Cases*, 95 Geo. L.J. 119, 125 n.30 (2006) (suggesting the Tenth Amendment's "independent force" is limited to "[l]aws that regulate states *qua* states"). Regardless of whether the Tenth Amendment has "independent force of its own," *Bond II*, 131 S. Ct. at 2367, we understand our constitutional inquiry to turn on whether principles of federalism are violated by the Act, in light of the Constitution's delegation to the President of the power "to make Treaties, provided two thirds of the Senators present concur," U.S. Const. art. II, § 2, cl. 2, and to Congress of the power to enact "all Laws which shall be necessary and proper for carrying into Execution ... all other Powers vested by th[e] Constitution in the Government of the United States, or in any Department or Officer thereof," U.S. Const. art. I, § 8, cl. 18.

Endeavoring to discover what impact the Tenth Amendment may have on treaty-implementing legislation immediately leads, as we have indicated, to the Supreme Court's decision in *Missouri v. Holland*. The statute at issue in that case, the Migratory Bird Treaty Act, 16 U.S.C. § 703, implemented a treaty between the United States and Great Britain that banned the hunting of migratory birds during certain seasons. *Holland*, 252 U.S. at 431. The State of Missouri brought suit against a U.S. game warden, arguing that the statute unconstitutionally interfered with the rights reserved to Missouri by the Tenth Amendment because Missouri was free to do what it wished with the birds while they were within its borders. *Id.* at 431-32. The Supreme Court, speaking through Justice Holmes, rejected that argument, reasoning that "it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article 2, Section 2, the power to make treaties is delegated expressly." *Id.* at 432.

As noted earlier, the Court made it clear that Congress may, under the Necessary and Proper Clause, legislate to implement a valid treaty, regardless of whether Congress would otherwise have the power to act or whether the legislation causes an intrusion into what would otherwise be within the state's traditional province. *Id.* at 432-33. While the Court did allow that there may be "qualifications to the treaty-making power," it also said, somewhat obscurely, that they had to be found "in a different way" than one might find limitations on other grants of power to the federal government.

Id. at 433. After implying that Congress's powers are particularly sweeping when dealing with "matters requiring national action," the Court suggested one limitation on the Treaty Power: if the implementation of a treaty "contravene[s] any prohibitory words to be found in the Constitution," then it may be unconstitutional. *Id.* (citation omitted). Since the treaty in question did not do that, the only remaining question was "whether it [was] forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Id.* at 433-34. The Court concluded that it was not. *See id.* (reasoning that, while "the great body of private relations usually fall within the control of the State, ... a treaty may override its power"). Finally, the Court assumed without further discussion that, because the treaty was valid, so was the implementing statute. *See id.* at 435 ("We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed.").

In sum, *Holland* teaches that, when there is a valid treaty, Congress has authority to enact implementing legislation under the Necessary and Proper Clause, even if it might otherwise lack the ability to legislate in the domain in question.[9] *See*

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[9] It has been argued that *Holland* incorrectly permits "treaties ... [to] expand the legislative power of Congress." Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867, 1875 (2005). The Cato Institute has submitted an amicus brief taking that position, arguing against *Holland*'s "impl[ication] that if a treaty commits the United

United States v. Lara, 541 U.S. 193, 201 (2004) ("[A]s Justice Holmes pointed out [in *Holland*], treaties made pursuant to [the Treaty Power] can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal.'" (quoting *Holland*, 252 U.S. at 433)). The legislation must, of course, meet the Necessary and Proper Clause's general requirement that legislation implemented under that Clause be "rationally related to the implementation of a constitutionally enumerated power." *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010); *see also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("[A]ll means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."). In the treaty context, that requirement has been understood to mean that a treaty and its

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States to enact some legislation, then Congress automatically obtains the power to enact that legislation, even if it would lack such power in the absence of the treaty." (Amicus Br. at 6.) Amicus argues that Congress's authority to act in connection with the Treaty Power only permits it to enact those laws that are necessary and proper to permit the President to make treaties—not to implement treaties once they are agreed upon. (*See id.* (arguing the President cannot increase Congress's power under the Necessary and Proper Clause by entering into a treaty).) Under that view, Congress could, for example, legislate to provide funding for an office of treaty-making, but could not have implemented the broadly worded Convention involved here. (*See id.* at 8 ("[T]his power would ... embrace any ... laws necessary and proper to ensuring the wise use of the power to enter treaties.").) *Holland* remains binding precedent, however, and forecloses this line of reasoning.

implementing legislation must be rationally related to one another. *United States v. Ferreira*, 275 F.3d 1020, 1027 (11th Cir. 2001). Thus, as long as "the effectuating legislation bear[s] a rational relationship to" a valid treaty, *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998), the arguable consequence of *Holland* is that treaties and associated legislation are simply not subject to Tenth Amendment scrutiny, no matter how far into the realm of states' rights the President and Congress may choose to venture. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 395 (1998) (taking exception with *Holland* to the extent it can be read to say that "the treaty power is immune from federalism restrictions because that power has been exclusively delegated to the federal government"); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 287 (4th ed. 2011) (stating that the *Holland* court "rejected the claim that state sovereignty and the Tenth Amendment limit the scope of the treaty power"); Louis Henkin, *Foreign Affairs and the U.S. Constitution* 191 (2nd ed. 1996) ("What [*Holland*] said, simply, was that the Constitution delegated powers to various branches of the federal government, not only to Congress; the Treaty Power was delegated to the federal treaty-makers, a delegation additional to and independent of the delegations to Congress. Since the Treaty Power was delegated to the federal government, whatever is within its scope is not reserved to the states: the Tenth Amendment is not material." (internal footnote omitted)). *But see* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations*

of the Nationalist Conception of the Treaty Power, 98 Mich. L. Rev. 1075, 1085 (2000) (noting that "treaties are not immune from federalism limitations, and nothing in [*Holland*] suggests the contrary," but acknowledging that "it is difficult to imagine realistic scenarios in which treaty stipulations would violate [the applicable] limitations").

Bond vigorously disputes the implications of that conclusion. Specifically, she argues that legal trends since the Supreme Court's 1920 decision in *Holland* make it clear that the Tenth Amendment should not be treated as irrelevant when examining the validity of treaty-implementing legislation. (*See* Appellant's Supp. Br. at 24 ("[I]n recent decades, the Supreme Court has reasserted the critical role of the Tenth Amendment in preserving the proper balance of authority between federal and state government to ensure that all levels of government represent and remain accountable to the People.").) Concluding otherwise, she asserts, would make "nothing ... off-limits" in a world where, more and more, "international treaties govern[] a virtually unlimited range of subjects and intrud[e] deeply on internal concerns." (*See id.* at 20.) That latter point is not without merit. Juxtaposed against increasingly broad conceptions of the Treaty Power's scope, reading *Holland* to confer on Congress an unfettered ability to effectuate what would now be considered by some to be valid exercises of the Treaty Power

runs a significant risk of disrupting the delicate balance between state and federal authority.[10]

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[10] The Supreme Court has focused renewed attention on federalism over the last two decades. Although many earlier cases reflect the importance of the our Constitution's basic provision for dual sovereigns, *see, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (observing that the rule requiring Congress to speak clearly in order to preempt state law "acknowledg[es] that the States retain substantial sovereign powers under our constitutional scheme"); *South Dakota v. Dole*, 483 U.S. 203, 211-12 (1987) (recognizing that Congress may not coerce the states when exercising its power to spend), more recent cases have been particularly pointed in describing the role federalism principles should play in analyzing assertions of federal authority. That trend began at least as early as the Court's decision in *New York v. United States*, 505 U.S. 144 (1992), which held that the federal government could not "commandeer[] the legislative processes of the States." *Id.* at 176 (citation and internal quotation marks omitted). After *New York*, the Court struck down legislation criminalizing local conduct in *United States v. Lopez*, 514 U.S. 549 (1995), as beyond the Commerce Clause Power. In doing so the Court recognized the importance of the states' authority to "defin[e] and enforc[e] the criminal law," and noted that, "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a change in the sensitive relation between federal and state criminal jurisdiction." *Id.* at 561 n.3 (citations and internal quotation marks omitted). In *Printz v. United States*, 521 U.S. 898, 919 (1997), the Court likewise considered principles of federalism in striking down legislation that required state police to perform background checks on potential gun owners. *See id.* at 19 (noting the establishment of dual sovereignties was "reflected throughout the Constitution's text," and had vested in the states "'a residuary and inviolable sovereignty.'" (quoting The Federalist No. 39 (James Madison))). Similarly, in *United States v. Morrison*, 529 U.S. 598 (2000), the Court struck down legislation making it a federal offense to commit a crime of violence motivated by

Those concerns notwithstanding, Bond does not argue that the Convention itself is constitutionally infirm. On the contrary, she admits "that a treaty restricting chemical weapons is a 'proper subject[] of negotiations between our government and other nations.'" (*Id.* at 4-5 (alteration in original) (citation omitted)). Accordingly, we need not tackle, head on, whether an arguably invalid treaty has led to legislation encroaching on matters traditionally left to the police powers of the states. Nevertheless, resolving the argument Bond does lodge against her prosecution requires at least some consideration of whether the Convention is, in fact, valid. *See Holland*, 252 U.S. at 432 ("*If the treaty is valid* there can be no dispute about the validity of the statute ... ." (emphasis added)). We therefore turn briefly to whether the Convention falls within the Treaty Power's appropriate scope, bearing in mind that Bond seems to accept that it does.

1. The Convention's Validity

The Constitution does not have within it any explicit subject matter limitation on the power granted in Article II, § 2. That section states simply that the President has the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur."

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gender, observing that "[t]he Constitution requires a distinction between what is truly national and what is truly local," *id.* at 617-18, and that there was "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims," *id.* at 618.

U.S. Const. art. II, § 2, cl. 2. Throughout much of American history, however, including when *Holland* was handed down, it was understood that the Treaty Power was impliedly limited to certain subject matters. *See* Bradley, *supra*, at 429 (arguing that "a subject matter limitation [on the Treaty Power] appears to have been assumed both during the Founding and at times during the nineteenth century," and suggesting it was likewise assumed by the *Holland* court); Golove, *supra*, at 1288 ("[V]irtually every authority, including the Supreme Court, has on countless occasions from the earliest days recognized general subject matter limitations on treaties.").

Contemporaneous records such as the Virginia Ratifying Convention show that the Founders generally accepted that the purpose of treaties was, as James Madison put it, to regulate "intercourse with foreign nations," and that the "exercise" of the Treaty Power was expected to be "consistent with" those "external" ends.[11] 3 *The Debates in The Several*

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[11] Other Founders shared Madison's understanding that the Treaty Power would be limited to matters involving foreign affairs. *Cf.* The Federalist No. 64 (John Jay) (noting that the "power of making treaties is an important one, especially as it relates to war, peace, and commerce"); The Federalist No. 75 (Alexander Hamilton) (stating that treaties "[were] not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign"). Notwithstanding the Founders' view of the Treaty Power's inherent limits, there is, again, nothing in the Constitution's text explicitly confining that power. The basis for that omission is perhaps best explained by Madison, who, like others, recognized the need for

State Conventions on the Adoption of the Constitution 514-15 (Jonathan Elliot ed., 2d ed. 1941) ("*The Virginia Debates*"); *see* The Federalist No. 45 (James Madison) (stating that the Treaty Power "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce"). As Madison later explained, if there was

> no limitation on the Treaty-making power ..., it might admit of a doubt whether the United States might not be enabled to do those things by Treaty which are forbidden to be done by Congress ...; but *no such consequence can follow, for it is a sound rule of construction, that what is forbidden to be done by all the branches of Government conjointly, cannot be done by one or more of them separately.*

5 Annals of Congress 671 (1796) (emphasis added).

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flexibility with respect to the Treaty Power and cautioned against expressly defining its scope:

> I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority[?] The definition might, and probably would, be defective. They might be restrained, by such a definition, from exercising the authority where it would be essential to the interest and safety of the community. It is most safe, therefore, to leave it to be exercised as contingencies may arise.

The Virginia Debates, *supra*, at 514-15.

Early cases followed that reasoning and indicated that the Treaty Power is confined to matters traditionally understood to be of international concern. *See, e.g.*, *Ross v. McIntyre*, 140 U.S. 453, 463 (1891) ("The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments."); *De Geofroy v. Riggs*, 133 U.S. 258, 266 (1890) ("That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear."); *Holden v. Joy*, 84 U.S. (17 Wall.) 211, 243 (1872) ("[I]nasmuch as the power is given, in general terms, without any description of the objects intended to be embraced within its scope, it must be assumed that the framers of the Constitution intended that it should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty ... .").

That is not to say, however, that any treaty encroaching on matters ordinarily left to the states was considered to be beyond the Treaty Power's permissible ambit. On the contrary, so long as the subject matter limitation was satisfied—which it undoubtedly was in cases involving "subjects [such as] peace, alliance, commerce, neutrality, and others of a similar nature," William Rawle, *A View of the Constitution of the United States* 65 (2d ed. 1829), or, as Jay put it, "war, peace, and commerce," The Federalist No. 64 (John Jay)—it was accepted that treaties could affect domestic issues. Many early decisions of the Supreme Court upheld treaties of that nature, including treaties regarding the

ownership and transfer of property. *See, e.g.*, *Carneal v. Banks*, 23 U.S. (10 Wheat.) 181, 189 (1825) (treaty between the United States and France that allowed citizens of either country to hold lands in the other). Still, it was widely accepted that the Treaty Power was inherently limited in the subject matter it could properly be used to address, *see Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) ("The treatymaking power is broad enough to cover all subjects that properly pertain to our foreign relations ... ."); *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924) ("The treaty-making power of the United States ... does not extend 'so far as to authorize what the Constitution forbids,' ... [but] does extend to all proper subjects of negotiation between our government and other nations."), and that the purpose of limiting the Treaty Power to matters which "in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty" was to ensure that treaties were "consistent with ... the distribution of powers between the general and state governments," *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 569 (1840).

Despite the long history of that view of the Treaty Power, the tide of opinion, at least in some quarters, has shifted decisively in the last half-century. Many influential voices now urge that there is no limitation on the Treaty Power, at least not in the way understood from the founding through to the middle of the Twentieth Century.[12] *See* Bradley,

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[12] Although at least one commentator has disputed that shift, *see* Golove, *supra*, at 1281, 1289 (stating that "commentators ...

supra, at 433 (describing the "rejection of a subject matter limitation on the treaty power" as "the accepted view"). That change is reflected in the

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have not rejected subject matter limitations" to the treaty power and arguing that, "[w]ere the President and Senate to make a treaty on a subject inappropriate for negotiation and agreement, and thus beyond the scope of the treaty power, the treaty would be invalid under the Tenth Amendment"), even then it has been acknowledged that "the traditional subject matter limitations on treaties are very general, and with globalization, the matters appropriate for treaties have expanded and will continue to do so," *id.* at 1291. That reality has been borne out by the kinds of conventions now extant in the international community. *See* Bradley, *supra*, at 397 n.29 (citing to, *inter alia*, the Convention on the Rights of the Child, *open for signature* Nov. 20, 1989, 28 I.L.M. 1456 (1989); the Convention on the Elimination of All Forms of Discrimination Against Women, S. Exec. Rep. No. 103-38 (1994); and the International Covenant on Economic, Social, and Cultural Rights, *open for signature* Dec. 19, 1966, 6 I.L.M. 360 (1967)). Considering the expanding subjects taken up in treaty-making and the nebulous standards associated with any lingering subject matter limitation, *see* Golove, *supra*, at 1090 ("The implication is clear: the President and Senate can make treaties on any subject *appropriate for negotiation* and agreement among states." (emphasis added)); Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 Harv. L. Rev. 1221, 1261 n.133 (1995) ("The Treaty Power is legitimate only for international agreements *fairly related* to foreign relations" (emphasis added)), whether the subject matter limitation has fully eroded is a serious question. For now, however, it is enough to note that, at least among certain commentators, it is no longer viewed as a meaningful restraint on the Treaty Power. *Cf.* Henkin, *supra*, at 197 & n.89 (citing the Third Restatement for the proposition that a limitation on the Treaty Power to matters of international concern "has now been authoritatively abandoned").

Restatement (Third) of Foreign Relations Law of the United States (1987) (the "Third Restatement"), which declares flatly that, "[c]ontrary to what was once suggested, the Constitution does not require that an international agreement deal only with 'matters of international concern.'"[13] Third Restatement § 302 cmt. c; *see id.* § 303(1) ("[T]he President, with the advice and consent of the Senate, may make any international agreement of the United States in the form of a treaty.").

Whatever the Treaty Power's proper bounds may be, however, we are confident that the Convention we are dealing with here falls comfortably within them. The Convention, after all, regulates the proliferation and use of chemical weapons. One need not be a student of modern warfare to have some appreciation for the devastation chemical weapons can cause and the corresponding impetus for international collaboration to take steps against their use. Given its quintessentially international character, we conclude that the Convention is valid under any reasonable conception of the Treaty Power's scope. In fact, as we discuss at greater length herein, because the Convention relates to war, peace, and perhaps

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[13] It, evidently, is not alone in that view. *See, e.g.*, Tribe, *supra*, at 1261 n.133 ("[E]stablishment of a joint, binational health care system by a treaty followed by implementing legislation would presumably be possible ... "); Henkin, *supra*, at 474 ("[W]hat is essentially a matter of 'domestic concern' becomes a matter of 'international concern' if nations do, in fact, decide to bargain about it.").

commerce,[14] it fits at the core of the Treaty Power. *See infra* note 18.

2. Interpreting Holland

Because *Holland* clearly instructs that "there can be no dispute about the validity of [a] statute" that implements a valid treaty, 252 U.S. at 432, the constitutionality of Bond's prosecution would seem to turn on whether the Act goes beyond what is necessary and proper to carry the Convention into effect, or, in other words, whether the Act fails to "bear a rational relationship to" the Convention, *Lue*, 134 F.3d at 84. According to Bond, however, only a simplistic reading of *Holland* could lead one to think that the Supreme Court was saying that "Congress's power to implement treaties is subject to no limit other than affirmative restrictions on government power like the First Amendment." (Appellant's Supp. Reply Br. at 9-10.)

The problem with Bond's attack is that, with practically no qualifying language in *Holland* to turn to, we are bound to take at face value the Supreme Court's statement that "[i]f the treaty is valid there can be no dispute about the validity of the statute ... as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. A plurality of the Supreme Court itself apparently gave that passage the simplistic reading Bond

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[14] Because we conclude that the Act is valid under the Necessary and Proper Clause, we express no opinion as to the merits of the Government's newly-discovered Commerce Clause argument.

denounces when it said, in *Reid v. Covert*, 354 U.S. 1 (1957), that:

> The Court [in *Holland*] was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government. To the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier.

Id. at 18.

It is true that Justice Holmes spoke later in *Holland* in language that implies a balancing of the national interest against the interest claimed by the State, *see Holland*, 252 U.S. at 435 ("Here a national interest of very nearly the first magnitude is involved."), but that was in the context of assessing the validity of the Migratory Bird Treaty itself, not the implementing statute. That the latter was constitutional in light of the validity of the former seemed to the Supreme Court to require no further comment at all.[15]

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[15] Bond recognizes that the *Holland* court "treated the legislation and treaty as co-extensive." (Appellant's Supp. Br. at 23.) Her conclusion from that is that when a treaty and its implementing legislation are not coextensive, the justification for enacting the legislation under the Necessary and Proper clause can collapse. We do not disagree; as noted, a treaty and treaty-implementing legislation must be "rationally related." *Ferreira*, 275 F.3d at 1027. As we discuss at greater length *infra*, however, the Act and the Convention with which we are

That does not mean, of course, that the *Holland* court would have spoken in the same unqualified terms had it foreseen the late Twentieth Century's changing claims about the limits of the Treaty Power, or had it been faced with a treaty that transgressed the traditional subject matter limitation.[16] *See id.* at 433 ("The case before us must be considered in light of our whole experience and not merely in that of what was said a hundred years ago."). It may well have chosen to say more about how to assess the validity of a treaty, and hence of coextensive treaty-implementing legislation. Perhaps *Holland*'s vague comment about "invisible radiation[s] from the general terms of the Tenth Amendment," *id.* at 434, would have been given

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dealing here are coextensive at least on the question of "use," which is the only point relevant to Bond's as-applied challenge. *See infra* Part II.B.3.

[16] The treaty at issue in *Holland* involved a subject of traditional international concern. *See* 56 Cong. Rec. 7361 (1918) (legislative testimony that the Migratory Bird Treaty Act "is essential to the preservation of our cotton, grain, and timber crops, whilst the migratory game birds contribute materially to our food supply. The bill may well be considered a measure of importance as affecting the successful prosecution of the war in which we are now engaged"). As the *Holland* court noted, "nothing in the Constitution ... compel[led] the Government to sit by while a food supply [was] cut off and the protectors of our forests and our crops [were] destroyed." 252 U.S. at 435. Consequently, the treaty dealt with "a national interest of very nearly the first magnitude" that could "only [be furthered] by national action in concert with that of another power." *Id.* at 435; *see id.* at 433 (stating that the treaty dealt with a "matter[] of the sharpest exigency" and that "the States individually [were] incompetent to act").

some further explication. As we have previously described, when *Holland* was decided, and, more importantly, when the Founders created the Treaty Power, it was generally understood that treaties should concern only matters that were clearly "international" in character, matters which, in *Holland*'s words, invoke a national interest that "can be protected only by national action in concert with that of another [sovereign nation]." *Id.* at 435. All the authors of The Federalist Papers, along with others from that era, considered the Treaty Power to be a necessary attribute of the central government for the important but limited purpose of permitting our "intercourse with foreign nations," *The Virginia Debates*, *supra*, at 514 (statement of James Madison), and thereby allowing for compacts "especially as [they] relate[] to war, peace, and commerce," The Federalist No. 64 (John Jay); *see supra* Part II.B.1. It was not a general and unlimited grant of power to the federal government.[17]

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[17] That the Founders understood Article II, § 2 to be a limited grant of power is clear, as the Tenth Amendment itself verifies. The available evidence of their thinking is that they did not intend for treaties to become a vehicle to usurp the general powers reserved to the states. *Cf. United States v. Pink*, 315 U.S. 203, 230 (1942) ("It is of course true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy."); *Holmes*, 39 U.S. at 569 ("The power to make treaties ... was designed to [be] ... consistent with ... the distribution of powers between the general and state governments.").

Because an implied subject matter limitation on the Treaty Power was a given at the time *Holland* was written, it was enough to answer the states' rights question in that case by pointing out that the Tenth Amendment only reserves those powers that are not delegated and that "the power to make treaties is delegated expressly." 252 U.S. at 432. Thus, *Holland*'s statement that "there can be no dispute about the validity" of a statute implementing a valid treaty, *id.*, is sensible in context and, in any event, binds us. We do not discount the significance of the Supreme Court's emphasis on the important role that federalism plays in preserving individual rights, *Bond II*, 131 S. Ct. at 2364, and it may be that there is more to say about the uncompromising language used in *Holland* than we are able to say,[18]

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[18] We pause to consider how, if *Holland* were not so clear in its "valid treaty equal valid implementing legislation" holding, treaties and implementing legislation might usefully be reviewed in light of the apparently evolving understanding of the Treaty Power that we have described. *See supra* Part II.B.1. The Founders deliberately drafted Article II, § 2 without defining the limits of the Treaty Power because they decided its scope required flexibility in the face of unknowable future events. *Cf. The Virginia Debates*, *supra*, at 514-15 (James Madison's observation that "it [is not] possible to enumerate all the cases in which such external regulations would be necessary. ... It is most safe, therefore, to leave it to be exercised as contingencies may arise"). We do not second guess the wisdom of their choice and acknowledge that any attempt to precisely define a subject matter limitation on the Treaty Power would involve political judgments beyond our ken. *Cf. Baker v. Carr*, 369 U.S. 186, 211 (1962) (stating that resolution of issues "touching foreign relations" often "turn on standards that defy judicial application, or involve the exercise of a

discretion demonstrably committed to" a coordinate branch); *Pink*, 315 U.S. at 232 ("[T]he field which affects international relations is 'the one aspect of our government that from the first has been most generally conceded imperatively to demand broad national authority' ... " (citation omitted)); *Lue*, 134 F.3d at 83 ("[I]t is not the province of the judiciary to impinge upon the Executive's prerogative in matters pertaining to foreign affairs.").

Nevertheless, while the outer boundaries of the Treaty Power may be hard to delineate, we can safely say that certain kinds of treaties fall within the core of that power, namely those dealing with war, peace, foreign commerce, and diplomacy directed to those ends. *See* The Federalist No. 45 (James Madison) (stating that the Treaty Power "will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce"); The Federalist No. 64 (John Jay) (stating the "power of making treaties is an important one, especially as it relates to war, peace, and commerce"). As to treaties of such character, it is hard to argue with the reasoning in *Holland* that, because "the power to make treaties is delegated expressly," 252 U.S. at 432, the Tenth Amendment has nothing meaningful to say. However, just as some treaties may fall comfortably within the traditionally understood bounds of the Treaty Power, some may be negotiated that will plainly fall outside that scope. If such a treaty were challenged, a court would be bound to take up an issue not present here, namely whether and when a treaty has reached a constitutional boundary, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *cf. Baker*, 369 U.S. at 211 (observing that not "every case or controversy which touches foreign relations lies beyond judicial cognizance"), recognizing that a treaty falling outside the limits of the Treaty Power would be unconstitutional as ultra vires, *cf.* Joseph Story, *Commentaries on the Constitution of the United States* 339 (Melville M. Bigelow, ed. 5th ed. 1994) (1891) ("A treaty to change the organization of the government, or annihilate its sovereignty, to overturn its republican form, or to deprive it of

but that very direct language demands from us a direct acknowledgement of its meaning, even if the result may be viewed as simplistic. If there is nuance there that has escaped us, it is for the Supreme Court to elucidate.

3. The Necessary and Proper Clause

Thus, because the Convention falls comfortably within the Treaty Power's traditional subject matter limitation, the Act is within the constitutional powers of the federal government under the Necessary and Proper Clause and the Treaty Power,

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its constitutional powers, would be void."). The deliberately vague boundaries of the Treaty Power would probably relegate that court to the unenviable position of saying it knew a violation when it saw one.

Before the outer limits of the treaty power are reached, however, it may be that federalism does have some effect on a treaty's constitutionality. While it is not our prerogative to ignore *Holland*'s rejection of federalism limitations upon the Treaty Power, the Supreme Court could clarify whether principles of federalism have any role in assessing an exercise of the Treaty Power that goes beyond the traditionally understood subject matter for treaties. *Holland* itself indicates that "invisible radiation[s] from the general terms of the Tenth Amendment" may be pertinent in deciding whether there is any space between obviously valid treaties and obviously ultra vires treaties and whether, in that space, some judicial review of treaties and their implementing legislation may be undertaken to preserve the federal structure of our government. The "invisible radiation[s]" imagery, 252 U.S. at 433-34, is unusual but, in light of current conceptions about the breadth of the Treaty Power, it may well be worth taking seriously. *Cf. Printz*, 521 U.S. at 921-22 (stating that the concept of dual sovereignty was "one of the Constitution's structural protections of liberty").

unless it somehow goes beyond the Convention. Bond argues that it does.[19]

She says that the Act covers a range of activity not actually banned by the Convention and thus cannot be sustained by the Necessary and Proper Clause. Whether that argument amounts to a facial or an as-applied attack on the Act, *see supra* note 5, it fails. We stated in *Bond I* that "Section 229 ... closely adheres to the language of the ... Convention," 581 F.3d at 138, and so it does. True, as Bond notes, the Convention bans persons from using, developing, acquiring, stockpiling, or retaining chemical weapons, 32 I.L.M. at 804, while the Act makes it unlawful to "receive, stockpile, retain, own, possess, use, or threaten to use" a chemical weapon, 18 U.S.C. § 229(a)(1), but those differences in wording do not prove that the Act has materially expanded on the Convention. *See United States v. Belfast*, 611 F.3d 783, 806 (11th Cir. 2010) ("[T]he existence of slight variances between a treaty and its congressional implementing legislation do not make the enactment unconstitutional; identicality is not required."). The meaning of the list in the former seems rather to fairly encompass the latter (with the possible exception of the "threaten to

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[19] As Judge Rendell correctly points out in her concurrence, Bond's emphasis is entirely misplaced to the extent she may be contending that her prosecution violates the Necessary and Proper Clause because the United States did not have to prosecute her to comply with its obligations under the Convention. (*See* Rendell Concurrence Op. at 3 ("Examining the scope of Congress's Necessary and Proper Power by definition requires us to examine the Act, not its enforcement.").)

use" provision of the Act) and, if the Act goes beyond the Convention at all, does not do so in the "use" aspect at issue here.

So while Bond's prosecution seems a questionable exercise of prosecutorial discretion,[20] and indeed appears to justify her assertion that this case "trivializes the concept of chemical weapons" (Appellant's Supp. Br. at 53), the treaty that gave rise to it was implemented by sufficiently related legislation. *See Comstock*, 130 S. Ct. at 1956 ("[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."); *Lue*, 134 F.3d at 84 (rejecting the argument "that because the Hostage Taking Convention targets a specific aspect of international terrorism—hostage taking—the statute effectuating the Convention must deal narrowly with international terrorism or risk invalidity" as a "cramped" view of Congressional authority, because treaty-implementing legislation must simply "bear a rational relationship to a permissible constitutional end").

In short, because the Convention pertains to the proliferation and use of chemical weapons, which are matters plainly relating to war and peace, we think

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[20] The decision to use the Act—a statute designed to implement a chemical weapons treaty—to deal with a jilted spouse's revenge on her rival is, to be polite, a puzzling use of the federal government's power.

it clear that the Convention falls within the Treaty Power's core. *See supra* note 18. Consequently, we cannot say that the Act disrupts the balance of power between the federal government and the states, regardless of how it has been applied here. *See Gonzales v. Raich*, 545 U.S. 1, 23 (2005) ("[W]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." (citations and internal quotation marks omitted));[21] *Holland*, 252 U.S. at 432 ("If the treaty is valid there can be no dispute about the validity of the [implementing] statute ... ."); *cf.* U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made ... shall be the supreme Law of the Land.").

III. Conclusion

For the foregoing reasons, we will affirm the judgment of conviction.

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[21] Although we acknowledge that the *Raich* Court's admonition against excising a class of activities from a valid assertion of federal power may have related to its status as a Commerce Clause case based on the aggregation principle employed in that context, *see* Richard H. Fallon, Jr., *Fact and Fiction About Facial Challenges*, 99 Cal. L. Rev. 915, 936 (2011) (opining that *Raich* "can be read as rejecting the possibility of successful as-applied challenges to assertions of legislative power under the Commerce Clause"), the principle would seem to hold with respect to federalism challenges arising from treaties within the Treaty Power's core. As we have already observed, *see supra* note 18, it is hard to argue with *Holland*'s rejection of federalism as an applicable concept as far as such treaties are concerned.

RENDELL, *Circuit Judge*, concurring.

I fully agree with the Majority's reasoning and result. I write separately to cast the issue before us in a somewhat different light, by expanding upon two aspects of the Majority's reasoning which, I believe, decide this case. As it crystallized before us at oral argument, Ms. Bond's challenge has little to do with the validity of the Convention. Her problem lies with the Act. She contends that the structure of federal-state relations is such that the Act should not apply to her actions, namely, conduct involving a domestic dispute that could be prosecuted under state law.[1] But, as the Majority rightly concludes, the Act is a valid exercise of Congress's Necessary and Proper Power. Moreover, no jurisprudential principle, grounded in federalism or elsewhere, saves her from the Act's reach.

I consider two questions raised by her argument: What is legally wrong with the Act, which reaches Ms. Bond's conduct?; and, What is wrong with the Act's application to Ms. Bond, given the structure of

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[1] As her counsel argued:

> And it really inheres in the statute. It's not that there's anything wrong in the abstract with the United States ratifying this treaty. That's not where the problem is.
>
> The problem is either at the moment they passed the statute that necessarily went this far or at the point that it becomes applied in this kind of situation.

(3d Cir. Argument at 13.)

federal-state relations? The answer to both is: Nothing.

As to the first question, nothing "wrong" occurred at the moment Congress passed the Act. As the Majority has thoroughly discussed, the Convention itself is valid—indeed, Ms. Bond unequivocally concedes that point. In turn, the Act, which implements the Convention, is valid as an exercise of Congress's Necessary and Proper Power. That is because the Necessary and Proper Clause affords Congress "'ample means'" to implement the Convention, and gives Congress the authority "to enact laws that are 'convenient, or useful' or 'conducive' ... to the 'beneficial exercise'" of the federal government's Treaty Power. *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010) (quoting *McCullogh v. Maryland*, 4 Wheat. 316, 408, 413, 418 (1819)). There is no question that the Act is rationally related to the Convention; it faithfully tracks the language of the Convention. Enacting a statute that essentially mirrors the terms of an underlying treaty is plainly a means which is "reasonably adapted to the attainment of a legitimate end"—ensuring that the United States complies with our international obligations under a valid treaty. *Comstock*, 130 S. Ct. at 1957 (internal quotation marks and citations omitted); *see also United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998) (upholding a statute implementing a treaty where "[t]he Act here plainly bears a rational relationship to the Convention; indeed, it tracks the language of the Convention in all material respects").

In examining the constitutionality of Congress's exercise of its Necessary and Proper Power, we need

not consider whether the prosecution of Ms. Bond is necessary and proper to complying with the Convention, as she would have us do. In other words, she argues that no nation-state would submit that the United States has failed to comply with its obligations under the Convention if the federal government did not prosecute Ms. Bond under the Act. But that is not the appropriate test. Examining the scope of Congress's Necessary and Proper Power by definition requires us to examine the Act, not its enforcement. To determine if the Act is necessary and proper, we ask whether it bears a rational relationship to the Convention. *See Comstock*, 130 S. Ct. at 1956 ("[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power."). Ms. Bond's actions fall plainly within the terms of the Act, and the Act bears a rational relationship to the Convention. So ends the Necessary and Proper inquiry.

The foregoing conclusion is enough to affirm Ms. Bond's conviction. As the Majority correctly reasons, *Missouri v. Holland*, 252 U.S. 416 (1920), forecloses challenging a valid statute implementing a valid treaty on Necessary and Proper grounds o. federalism grounds. *See* Maj. Op. at 31-35; *Holland*, 252 U.S. at 432 ("If the treaty is valid there can be no dispute about the validity of the statute" under the Necessary and Proper Clause).

But even if Ms. Bond were able to assert a federalism challenge to her conviction, she proposes

no principle of federalism that would limit the federal government's authority to prosecute her under the Act. Thus, as to the second question, Ms. Bond argues that if the statute is applied to her, and, is thus read to "criminalize every malicious use of poisoning," then principles of federalism are violated by disturbing the division of power between the federal government and the states. (3d Cir. Argument at 15.) As appealing as the argument sounds—that a federal statute should not reach an essentially local offense like this—there is in fact no principled reason to limit the Act's reach when her conduct is squarely prohibited by it. The fact that an otherwise constitutional federal statute might criminalize conduct considered to be local does not render that particular criminalization unconstitutional. As the Supreme Court explained in *Gonzales v. Raich*, when "the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." 545 U.S. 1, 23 (2005) (internal quotation marks and citations omitted). The fact that the Act, which properly implements a valid treaty, reaches non-terrorist uses of chemical weapons leaves us powerless to excise such an individual instance. True, *Raich* involved Congress's Commerce Clause Power. But the Majority is correct to apply its principle to this case, particularly in light of the Supreme Court's rejection, in *Holland*, of federalism as a basis to challenge a statute implementing an otherwise valid treaty. *See* Maj. Op. at 37 n.21; *Holland*, 252 U.S. at 432.

Ms. Bond continues to urge otherwise, asking us to consider the "world where the Supreme Court recognizes that the Tenth Amendment is primarily about protecting individual liberty," (3d Cir. Argument at 74), and to find controlling here cases like *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S. 898 (1997), in which the Supreme Court recognized that some acts of Congress, even if they are otherwise valid under an enumerated power, can run afoul of the Tenth Amendment. But this case is not like *New York* or *Printz*, in which Congress wrongfully commandeered states' legislative processes and public officials. Nothing in those cases suggests a principle of federalism that would apply to this case.

Moreover, it is not enough to urge, as Ms. Bond does, that Pennsylvania law and authorities are equally able to handle, and punish, this conduct so that, from a federalism standpoint, we should leave the matter to Pennsylvania. That view simply misstates the law. We have a system of dual sovereignty. Instances of overlapping federal and state criminalization of similar conduct abound. But Ms. Bond argues that here, unlike the case with other federal crimes, no federal interest is being served by prosecuting every malicious use of a chemical. That argument fails for two reasons. First, there exists nowhere in the law a rule requiring that a statute implementing a treaty contain an element explicitly tying the statute to a federal interest so as to ensure that a particular application of the statute is constitutional. *Cf. United States v. Wilson*, 73 F.3d 675, 685 (7th Cir. 1995) (reasoning that a jurisdictional element is not constitutionally

required in a federal criminal statute enacted pursuant to Congress's Commerce Clause authority). Second, even if we were to require that there be a clear federal interest, Ms. Bond incorrectly characterizes the federal interest that is represented by her prosecution as one in prosecuting every malicious use of a chemical. Rather, the federal interest served is twofold: combating the use and proliferation of chemical weapons, and complying with the United States' obligations under a valid treaty.[2] *See* Chemical Weapons Convention, art. VII.1, 32 I.L.M. 800, 810 (1993) (requiring each signatory nation to, "in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention"). Additionally, whether there is a distinction, and where that distinction lies, between combating the use and proliferation of chemical weapons and prosecuting the malicious use of a chemical, is exceedingly difficult to discern.

In sum, Congress passed the Act, which is constitutionally sound legislation, to implement the Convention, a constitutionally sound treaty. Ms. Bond's appeal generally to federalism, rather than to a workable principle that would limit the federal

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[2] I agree with Ms. Bond that states sometimes also bear some responsibility for ensuring compliance with our treaty obligations. *See Medellín v. Texas*, 552 U.S. 491 (2008). But that fact does not nullify Congress's authority to pass treaty-implementing legislation so as to ensure uniform, nationwide compliance with our international obligations, nor does it suggest that Congress lacks the power to do so.

government's authority to apply the Act to her, is to no avail.

The real culprits here are three. First, the fact pattern. No one would question a prosecution under the Act if the defendant were a deranged person who scattered potassium dichromate and 10-chloro-10H-phenoxarsine, the chemicals which Ms. Bond used, on the seats of the New York subway cars. While that defendant could be punished under state law, applying the Act there would not offend our sensibilities. The application, however, to this "domestic dispute," somehow does.

Second, the "use" of chemical weapons as prescribed in the Act has an admittedly broad sweep. *See* Maj. Op. at 11 n.7; Chemical Weapons Convention, art. VII.1(a), 32 I.L.M. at 810 (requiring each signatory nation to "[p]rohibit natural and legal persons anywhere on its territory ... from undertaking any activity prohibited ... under this Convention, including enacting penal legislation with respect to such activity"). Because the Act tracks the Convention, however, Congress had the power to criminalize all such uses. Perhaps, in carrying out the United States' treaty obligations, Congress could have created a more expansive exception for "peaceful purposes," but it did not.

Lastly, the decision to prosecute is troubling. The judgment call to prosecute Ms. Bond under a chemical weapons statute rather than allowing state authorities to process the case is one that we question. But we see that every day in drug cases. Perhaps lured by the perception of easier convictions and tougher sentences, prosecutors opt to proceed

federally. *See* Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. Cal. L. Rev. 643, 668-75 (1997). There is no law against this, or principle that we can call upon, to limit or regulate it.

While the Majority opinion explores arguments regarding the limits of the Treaty Power, I find Ms. Bond's argument to be much more limited in scope, although equally unsupportable. I agree that we should affirm the judgment of the District Court.

AMBRO, *Circuit Judge*, concurring.

I concur in the result reached by Judge Jordan's thoughtful opinion. I write separately to urge the Supreme Court to provide a clarifying explanation of its statement in *Missouri v. Holland* that "[i]f [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. 416, 432 (1920).[1]

Absent that undertaking, a blank check exists for the Federal Government to enact any laws that are rationally related to a valid treaty and that do not transgress affirmative constitutional restrictions, like the First Amendment. This acquirable police power, however, can run counter to the fundamental principle that the Constitution delegates powers to the Federal Government that are "few and defined" while the States retain powers that are "numerous and indefinite." The Federalist No. 45 (James Madison).

Since *Holland*, Congress has largely resisted testing the outer bounds of its treaty-implementing

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[1] As I noted in our Court's previous opinion in this case, *see United States v. Bond*, 581 F.3d 128, 135 (3d Cir. 2009), *rev'd in part by*, *Bond v. United States*, 131 S.Ct. 2355 (2011), the scope and persuasiveness of *Holland* has generated much academic debate. *See, e.g.*, Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867 (2005); Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403 (2003); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390 (1998).

authority. *See* Peter J. Spiro, *Resurrecting* Missouri v. Holland, 73 Mo. L. Rev. 1029 (2008). But if ever there were a statute that did test those limits, it would be Section 229. With its shockingly broad definitions, Section 229 federalizes purely local, run-of-the-mill criminal conduct. The statute is a troublesome example of the Federal Government's appetite for criminal lawmaking.[2] Sweeping statutes like Section 229 are in deep tension with an important structural feature of our Government: "'The States possess primary authority for defining and enforcing the criminal law.'" *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)); *see also Patterson v. New York*, 432 U.S. 197, 201 (1977) ("It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government ....").

I hope that the Supreme Court will soon flesh out "[t]he most important sentence in the most

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[2] "[T]he federal criminal code now includes at least 4,450 crimes. Congress added an average of 56.5 crimes per year to the federal code between 2000 and 2007 and has raised the total number of federal crimes by 40 percent since 1970. Moreover, the federal criminal code has grown not just in size but in complexity, making it difficult to both (1) determine what statutes constitute crimes and (2) differentiate whether a single statute with different acts listed within a section or subsection includes more than a single crime and, if so, how many." John C. Eastman, *The Outer Bounds of Criminal Law: Will Mrs. Bond Topple* Missouri v. Holland*?*, 2011 Cato. Sup. Ct. Rev. 185, 193 (2011) (internal footnotes, quotation marks, and alterations omitted).

important case about the constitutional law of foreign affairs," Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867, 1868 (2005), and, doing so, clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2677

UNITED STATES OF AMERICA

v.

CAROL ANNE BOND,

Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal Action No. 2:07-cr-00528-001)
District Judge: Honorable James S. Giles

Argued March 23, 2009

Before: RENDELL, AMBRO, and JORDAN,
Circuit Judges

PRECEDENTIAL
(Opinion Filed: September 17, 2009)

OPINION OF THE COURT

AMBRO, *Circuit Judge.*

Carol Anne Bond pled guilty to two counts of possessing and using a chemical weapon, and two counts of mail theft, in connection with her efforts to harm a former friend. She now appeals the District Court's pretrial order denying her motions to dismiss the charges against her and to suppress evidence. She also challenges her sentence. For the reasons that follow, we affirm each of the Court's actions.

I. Factual and Procedural Background

Bond was excited when her closest friend, Myrlinda Haynes, announced that she was pregnant. Bond's excitement turned to rage when she learned that her husband, Clifford Bond, was the child's father. She vowed revenge.

Planning to poison Haynes, Bond (a trained microbiologist) stole a quantity of 10-chloro-10H-phenoxarsine from her employer, the chemical manufacturer Rohm and Haas, and ordered over the Internet a vial of potassium dichromate. These chemicals have the rare ability to cause toxic harm to individuals through minimal topical contact.[1]

Bond attempted to poison Haynes with the chemicals at least 24 times over the course of several

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[1] Half a teaspoon of 10-chloro-10H-phenoxarsine ingested is lethal to an adult, while a few crystals of the substance is highly toxic. The same is true for potassium dichromate, with less than one-quarter of a teaspoon ingested being lethal and an even smaller number of crystals is toxic. App. at 239-56.

months. She often would spread them on Haynes's home doorknob, car door handles, and mailbox. Haynes noticed the chemicals and usually avoided harm, but on one occasion sustained a chemical burn to her thumb.

Haynes called her local police about the chemical attacks. They suggested that the substance might be cocaine and told Haynes to clean her car and door handles on a regular basis. Unsatisfied (to say the least) with this response, Haynes complained to her local postal carriers about the chemicals on her mailbox. They referred the matter to the United States Postal Inspection Service.

Based on Haynes's complaint, postal inspectors placed surveillance cameras in and around Haynes's home. These cameras captured Bond opening Haynes's mailbox, stealing a business envelope, and placing potassium dichromate inside Haynes's car muffler. They specifically showed Bond going back and forth between her car and Haynes's with the chemicals.

After testing the chemicals that Bond placed in Haynes's muffler, postal inspectors attempted to trace their origin to the Rohm and Haas center where Bond worked as a technical assistant. The inspectors determined that nearly four pounds of potassium dichromate were missing from a common storage area to which Bond had access.

With this information, the inspectors sought and received an arrest warrant for Bond and search warrants for her car and home. They supported their warrant requests with an affidavit detailing the gathered evidence, including the videotaped footage,

results of the chemical analyses, and the report of the missing chemicals. The affidavit also explained Bond's responsibilities at Rohm and Haas, described her car and home, and noted that Haynes had identified Bond from a photo array.

Postal inspectors arrested Bond and took her to a holding cell in the Philadelphia Post Office. Once there, Bond acknowledged and waived her constitutional rights, and admitted to taking the chemicals from Rohm and Haas. Meanwhile, other inspectors executed the search warrants, finding a piece of Haynes's mail and amounts of the chemicals in Bond's home and car.

A grand jury in the Eastern District of Pennsylvania charged Bond with two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. § 229(a)(1), a criminal statute implementing the treaty obligations of the United States under the 1993 Chemical Weapons Convention. The grand jury also charged Bond with two counts of mail theft, in violation of 18 U.S.C. § 1708.

Bond moved to suppress certain evidence and to dismiss the two chemical weapons charges. She claimed that the affidavits supporting the search warrants failed to establish probable cause to search her home and car, and she argued that 18 U.S.C. § 229 is unconstitutional because it violates principles of federalism embodied in our Constitution and the fair notice requirements of its Due Process Clause.

The District Court denied Bond's motions. It ruled that § 229 did not impinge on principles of

federalism because it "was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution ... [to] comply with the provisions of a treaty." App. 168. The Court next concluded that "the statute is not vague, [because] it is clear that if anybody uses a toxic chemical for other than peaceful purposes, th[at] person can be prosecuted." *Id.* at 169. It ruled as well that "the search warrants were properly issued," because sufficient evidence existed to permit a "probable cause conclusion that a substantial amount of potassium dichromate would probably be found in [Bond's] vehicle or where she lived." *Id.* at 170-72.

Following the Court's denial of her motions, Bond pled guilty to all charges, reserving her right to appeal. The Court then held a sentencing hearing at which it enhanced Bond's total offense level by two levels based on a determination under U.S.S.G. § 3B1.3 that she used a special skill in the commission or her offense. The Court ultimately sentenced Bond to six years' imprisonment, five years of supervised release, a $2,000 fine, and restitution of $9,902.79. Bond appeals.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction under 18 U.S.C. § 3231. We have jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

We review *de novo* a challenge to the constitutionality of a criminal statute. See *De Leon-Reynoso v. Ashcroft*, 293 F.3d 633, 635 (3d Cir. 2002). We consider "denial of a motion to suppress for clear error as to the underlying factual findings and exercise[ ] plenary review of the District Court's

application of the law to those facts." *United States v. Perez*, 280 F.3d 318, 336 (3d Cir. 2002). We likewise review *de novo* the District Court's interpretation of the Sentencing Guidelines and consider its related findings of fact for clear error. *See United States v. Wood*, 526 F.3d 82, 85 (3d Cir. 2008).

III. Discussion

Bond claims that (1) 18 U.S.C. § 229 is unconstitutional, (2) the search warrants for her home and car were invalid, and (3) her conduct did not justify a sentence enhancement for using a special skill in the commission of a crime. We reject each of these claims.

A. Constitutionality of 18 U.S.C. § 229

The United States, along with many other nations, signed the Chemical Weapons Convention in 1993 to ensure "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons...." 32 I.L.M. 800, 804 (1993). This treaty states, among other things, that each signing nation "shall[,] in accordance with its constitutional process, adopt the necessary measures to implement its obligations under this Convention." *Id.* at 810. It specifically requires a complying nation to "[p]rohibit natural and legal persons anywhere on its territory ... from undertaking any activity prohibited ... under this Convention, including enacting penal legislation with respect to such activity." *Id.*

The United States fulfilled its responsibilities under the treaty through the Chemical Weapons Convention Implementation Act of 1998, 22 U.S.C. § 6701, and the Act's associated penal provision, 18 U.S.C. § 229. In relevant part, § 229 reads:

> (a) Unlawful Conduct—Except as provided in subsection (b), it shall be unlawful for any person knowingly—
>
> > (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or
> >
> > (2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt to conspire to violate paragraph (1).

18 U.S.C. § 229(a). "Chemical weapon" is defined as a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." *Id.* at § 229F(1)(A). "Toxic chemical" is defined in part as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* at § 299F(8)(A). Importantly, § 229 neither has a requisite federal interest element (*i.e.*, a requirement that an offender's conduct affect interstate commerce or a federal person, possession, or interest) nor states a basis for its enactment beyond the Chemical Weapons Convention (*i.e.*, it does not assert

authority under the Commerce Clause or other constitutional provision).

Based on this framework, Bond asserts that § 229 violates constitutional principles of federalism because it is not "based on a valid exercise of constitutional authority," and does not "require proof of a federal interest." Bond's Br. at 10. She also claims that the provision is unconstitutionally vague and overbroad "by virtue of its enormous scope" and its failure to "provide fair notice" of the conduct covered by its terms. *Id.* at 28.

1. Federalism Challenge

"Under our federal system[,] the administration of criminal justice rests with the States except as Congress, acting within the scope of [its] delegated powers, has created offenses against the United States." *Screws v. United States*, 325 U.S. 91, 109, 65 S.Ct. 1031, 89 L.Ed. 1495 (1945). Bond contends that, by permitting prosecution of "localized" offenses "without regard to the ... federalism boundaries enshrined in the Constitution[,]" § 229 "signals a massive and unjustifiable expansion of federal law enforcement into [the] state-regulated domain." Bond's Br. at 10-11, 16. Specifically, she argues that because the statute "brings citizens into the federal criminal area for conduct not properly the subject of federal prosecutors," *id.* at 11, and because it "significantly restrike[s] the delicate balance between the federal and state governments," it violates "the unique system of federalism"

protected by the Tenth Amendment to the Constitution.[2] *Id.*

The Government responds that the Tenth Amendment is no impediment to the operation of § 229 because Congress had authority to enact it under the Necessary and Proper Clause of the Constitution as a law enforcing its Treaty Power.[3] Relying on *Missouri v. Holland*, 252 U.S. 416, 432, 40 S.Ct. 382, 64 L.Ed. 641 (1920), the Government asserts that § 229 need not be authorized by a specific power given to Congress, nor contain a requisite federal interest element, because the Chemical Weapons Convention is a valid treaty and "[i]f [a] treaty is valid there can be no dispute about the validity of the statute [implementing it] under Article I, § 8, as a necessary and proper means to execute the powers of the Government." Gov't's Br. at 27 (quoting *United States v. Lue*, 134 F.3d 79, 84 (2d Cir. 1998)). The Government highlights as well the declaration in *Holland* that "[i]t is obvious that

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[2] The Tenth Amendment provides in full: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[3] The Necessary and Proper Clause gives Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* at art. I, § 8, cl. 2. The Treaty Power permits the President, "by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur...." *Id.* at art. II, § 2, cl. 2.

there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could." 252 U.S. at 433, 40 S.Ct. 382; *see also United States v. Lara*, 541 U.S. 193, 201, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). Thus, states the Government, even if § 229 were "otherwise prohibited legislation" under the Tenth Amendment, "the treaty power invest[ed] Congress with independent authority to pass [it]." Gov't's Br. at 26.

These arguments appear to present issues of first impression in our Court. They raise questions about what constitutional authority treaty-implementing legislation must cite, and how far such legislation may reach into an area over which "[s]tates possess primary authority." *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The arguments also ask us to wade into the debate over the scope and persuasiveness of the decision in *Holland*. *Compare United States v. Ferreira*, 275 F.3d 1020, 1027-28 (11th Cir. 2001) (applying *Holland* to hold that "because Congress's authority under the Necessary and Proper clause extends beyond those powers specifically enumerated in Article I, section 8, it may enact laws necessary to effectuate the treaty power" (internal quotations omitted)), *and Lue*, 134 F.3d at 84-85 (same), *with Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1163 (2d Cir. 1988) (remarking that, despite *Holland*, the ability of the

treaty power to override "state prerogatives" is uncertain).[4]

But before we can reach the merits of these arguments, we must ensure that Bond has standing to raise a Tenth Amendment challenge to § 229. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101-02, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (requiring that courts decide jurisdictional issues before considering the merits of a claim). Because this inquiry implicates our jurisdiction, we conduct it even though the parties did not address it in their initial briefs. *See Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 216 (3d Cir. 2003).[5]

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[4] In addition, a significant scholarly debate exists over whether the Supreme Court correctly decided *Holland*. *Compare* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) (asserting that constitutional history and "the fundamental principle of national supremacy" support Holland's recognition of broad congressional authority to enact treaty-enforcing legislation), *with* Nicholas Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005) (arguing that *Holland* "is wrong and ... should be overruled" because constitutional text, history, and structure, along with practical considerations, weigh against it). This debate suggests mounting interest for reconsideration of the rationale for *Holland*'s holding, especially arguments rooted in the text and history of the Constitution. *See* Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 391-402, 423-61 (1998); Rosenkranz, *supra*, at 1880-1918; Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403, 404-533 (2003).

[5] After identifying standing as an unresolved question in Bond's federalism challenge to § 229, we requested and received supplemental briefing from the parties.

In *Tennessee Electric Power Co. v. Tennessee Valley Authority*, 306 U.S. 118, 143-144, 59 S.Ct. 366, 83 L.Ed. 543 (1939), utility companies chartered in Tennessee argued that the sale of electrical power by the federally chartered Tennessee Valley Authority was an impermissible federal regulation of a local matter in violation of the Tenth Amendment. The Supreme Court rejected this argument, concluding that the private companies lacked standing to maintain their claim:

> The sale of government property in competition with others is not a violation of the Tenth Amendment. As we have seen[,] there is no objection to the Authority's operations by the states, and, if this were not so, the [utility companies], absent the states or their officers, have no standing in this suit to raise any question under the [Tenth] [A]mendment.

Id. at 144, 59 S. Ct. 366.[6]

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[6] Bond argues that the language regarding private party Tenth Amendment standing in *Tenn. Elec. Power Co.* "is textbook *dicta* and thus does not bind this Court." Bond's Supp. Br. at 2. But "[t]he [Supreme] Court dismissed the Tenth Amendment claim after analyzing both the standing issue and the merits, and hence, the former holding is an alternative ground, rather than *obiter dictum*." *Medeiros v. Vincent*, 431 F.3d 25, 34 (1st Cir. 2005) (citing *California v. United States*, 438 U.S. 645, 689 n. 10, 98 S.Ct. 2985, 57 L.Ed.2d 1018 (1978)). Furthermore, because the standing question in *Tenn. Elec. Power Co.* concerned the constitutional jurisdiction of a federal court, its resolution predominates any discussion of the merits. *See Steel Co.*, 523 U.S. at 94-95, 118 S.Ct. 1003.

Despite this explicit holding, courts of appeals are split on whether private parties have standing to challenge a federal act on the basis of the Tenth Amendment. Two circuit courts have allowed private parties to bring such challenges. *See Gillespie v. City of Indianapolis*, 185 F.3d 693, 703-04 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116, 120 S.Ct. 934, 145 L.Ed.2d 813 (2000); *Atlanta Gas Light Co. v. U.S. Dep't of Energy*, 666 F.2d 1359, 1368 n.16 (11th Cir. 1982).[7] Five have not. *See United States v. Hacker*, 565 F.3d 522, 525-527 (8th Cir. 2009); *Oregon v. Legal Servs. Corp.*, 552 F.3d 965, 971-72 (9th Cir. 2009); *Brooklyn Legal Servs. Corp. v. Legal Servs. Corp.*, 462 F.3d 219, 234-35 (2d Cir. 2006), *cert. denied*, 552 U.S. 810, 128 S.Ct. 44, 169 L.Ed.2d 11 (2007); *Medeiros v. Vincent*, 431 F.3d 25, 33-36 (1st Cir. 2005), *cert. denied*, 548 U.S. 904, 126 S.Ct. 2968, 165 L.Ed.2d 951 (2006); *United States v. Parker*, 362 F.3d 1279, 1284-85 (10th Cir. 2004), *cert. denied*, 543 U.S. 874, 125 S.Ct. 88, 160 L.Ed.2d 124 (2004).

The Seventh Circuit Court stated most clearly the rationale for permitting private parties, notwithstanding *Tennessee Electric*, to raise Tenth

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[7] Since deciding *Atlanta Gas Light Co.*, the Eleventh Circuit has retreated somewhat from that case's determination—which did not consider the holding in *Tennessee Electric*—that private parties have standing to pursue a Tenth Amendment claim. *See Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1335 (11th Cir. 2007) (denying private parties standing to raise a Tenth Amendment claim because they expressed only an "undifferentiated, generalized grievance"); *Seniors Civil Liberties Ass'n v. Kemp*, 965 F.2d 1030, 1034 n.6 (11th Cir. 1992) (applying *Atlanta Gas Light Co.* "with admitted doubts").

Amendment concerns absent the involvement of a state. Deciding that a state police officer had standing independently to maintain a Tenth Amendment claim against a federal gun regulation, the Court emphasized that "standing barriers have been substantially lowered in the decades since the Supreme Court decided [*Tennessee Electric*]." *Gillespie*, 185 F.3d at 700. It further explained that *New York v. United States*, 505 U.S. 144, 181-82, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), cabined the holding of *Tennessee Electric* by establishing that, "in making Tenth Amendment claims, [an individual] actually is asserting his own rights." *Gillespie*, 185 F.3d at 703. The Court based this explanation on the Supreme Court's statement in *New York* that "the Constitution divides authority between federal and state governments for the protection of individuals[,]" 505 U.S. at 181, 112 S.Ct. 2408, which convinced the Seventh Circuit panel that "the Tenth Amendment, although nominally protecting state sovereignty, ultimately secures the rights of individuals." *Gillespie*, 185 F.3d at 703.

Contrary to this reasoning, the five circuit courts to reject independent private party standing for Tenth Amendment claims have focused on the continuing authority of *Tennessee Electric*. *See, e.g.*, *Oregon*, 552 F.3d at 972; *Brooklyn Legal Servs. Corp.*, 462 F.3d at 234. Noting that the Supreme Court's "'decisions remain binding precedent until [it] see[s] fit to reconsider them,'" *Hacker*, 565 F.3d at 527 (quoting *Hohn v. United States*, 524 U.S. 236, 252-53, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998)), these courts have ruled that *Tennessee Electric* denies private plaintiffs standing for Tenth

Amendment claims because there exists "no directly contradictory authority from the Supreme Court." *Id.* at 526. The courts also point to varying prudential considerations to support their determinations. *See, e.g., id.* at 527 (suggesting that the holding of *Tennessee Electric* comports with prudential standing principles that generally limit a plaintiff to asserting his own rights); *Medeiros*, 431 F.3d at 36 (hesitating to disregard *Tennessee Electric* because doing so might induce a "substantial increase in ... litigation before the federal courts").

We are persuaded by the reasoning advanced by the majority of our sister courts and conclude that a private party lacks standing to claim that the federal Government is impinging on state sovereignty in violation of the Tenth Amendment, absent the involvement of a state or its officers as a party or parties. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). The holding of *Tennessee Electric* thus is binding irrespective of the language in *New York* about federalism's "protection of individuals." *See Medeiros*, 431 F.3d at 34 (noting also that *New York* never actually dealt with the question of standing). Moreover, the fact that the Supreme Court in this decade granted *certiorari* on, but later declined to answer, the question of "whether private plaintiffs have standing to assert 'states' rights' under the Tenth

Amendment," *Pierce County, Washington v. Guillen*, 537 U.S. 129, 148 n. 10, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003), does no more than indicate an interest of at least four Justices in *Tennessee Electric*'s binding status.

Our interpretation makes it evident that Bond lacks standing to pursue her Tenth Amendment challenge to § 229. The "requisite representation by the states or their officers is notably absent" from her suit, *Brooklyn Legal Servs. Corp.*, 462 F.3d at 234, and she does not even attempt to argue that her interests are aligned with those of a state. *Cf. Parker*, 362 F.3d at 1284 (speculating that a private party could assert a Tenth Amendment claim by showing that her claim "align[s] with the state's interest"). Accordingly, we will not reach the merits of Bond's arguments concerning the constitutionality of § 229 under our federal system of government.[8]

2. Vagueness Claim

The remainder of Bond's constitutional challenge to 18 U.S.C. § 229 presents her claims that the statute is vague and overbroad. She asserts that because "[v]irtually any activity with a chemical ...

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[8] Despite Bond's suggestion to the contrary, see Bond's Supp. Br. at 4, our conclusion does not bar individuals from any recourse in the face of Tenth Amendment violations accepted by a state. As the First Circuit Court explained, "the State represents the interests of its citizens in general, and, if it refuses to prosecute a viable Tenth Amendment claim, the citizens of that state may have recourse to local political processes to effect change in the state's policy of acquiescence." *Medeiros*, 431 F.3d at 35.

can cause 'death, temporary incapacitation or permanent harm to humans or animals' ... [, d]efendants in good faith could easily be unsure about what conduct is prohibited" under the statute. Bond's Br. at 28 (quoting 18 U.S.C. § 229F(8)(A)).

A statute is unconstitutionally overbroad if it "does not aim specifically at the evils within the allowable area of control by the government, but ... sweeps within its ambit other constitutionally protected activities." *Waterman v. Farmer*, 183 F.3d 208, 212 n.5 (3d Cir. 1999) (internal quotations omitted). "A statute is unconstitutionally vague if 'men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *McAllister v. Att'y Gen.*, 444 F.3d 178, 186 (3d Cir. 2006) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926)). "[O]utside of the First Amendment context, a party has standing to raise a vagueness challenge only if the challenged statute is vague as to that party's conduct." *United States v. Woods*, 915 F.2d 854, 862 (3d Cir. 1990).

Section 229, to repeat, closely adheres to the language of the Chemical Weapons Convention and states, in relevant part:

> (a) Unlawful Conduct—Except as provided in subsection (b), it shall be unlawful for any person knowingly—
>
> > (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or

> (2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt to conspire to violate paragraph (1).

It further defines a "chemical weapon" as a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." *Id.* at § 229F(1)(A).[9] And it describes a "toxic chemical" as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* at § 299F(8)(A).

While these terms are certainly broad, we conclude that they are neither vague as applied to Bond's actions nor overbroad in their relation to constitutionally protected behavior. *See McAllister*, 444 F.3d at 186. First, there is no doubt that "a person of reasonable intelligence" would know that Bond's conduct violated § 229.[10] Over a period of

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[9] "[P]urpose[s] not prohibited under" § 229 include "individual self-defense devices," 18 U.S.C. § 229C, and:

> (A) Peaceful purposes. Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.
>
> (B) Protected purposes. Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.
>
> (C) Unrelated military purposes....
>
> (D) Law enforcement purposes....

Id. at § 229F

[10] Because Bond understandably does not claim that her chemical attacks on Haynes were expressive activities

eight months, Bond researched, stole, and deployed highly toxic chemicals with the intent of harming Haynes. Any one of her attacks could have delivered a lethal chemical dose to Haynes or her then-infant child. Bond's actions thus clearly constituted unlawful possession and use of a chemical weapon under § 229.

Second, as even Bond notes, "[t]he statute casts a wide net for obvious reasons." Bond's Br. at 31. Though it potentially criminalizes the harmful use or production of chemicals found in "the cleaning supply aisles at the local grocery store," *id.*, it does not criminalize "protected acitivit[ies] outside the permissible bounds of Congressional regulation." *McAllister*, 444 F.3d at 186. It therefore is not unconstitutionally overbroad.

B. Validity of Search Warrants

Aside from her constitutional challenge to § 229, Bond seeks to suppress the evidence gathered from her home and vehicle "[b]ecause no probable cause to search [them] existed." Bond's Br. at 33. Bond claims that the affidavit supporting the search warrants "lacked any statement as to why the affiant might have expected the desired evidence to be present at either location," and "provided no basis for the conclusion that [Bond] owned the specified vehicle or

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protected by the First Amendment, her vagueness challenge can succeed only if the statute is vague in its application to her specific conduct. *See United States v. Powell*, 423 U.S. 87, 92, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975).

resided at the address provided." *Id.* at 34-35. These claims fail.

"To find probable cause to search, there needs to be a 'fair probability that contraband or evidence of a crime will be found in a particular place.'" *United States v. Burton*, 288 F.3d 91, 103 (3d Cir. 2002) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983)). To determine this, a court must consider the "totality of the circumstances," *Gates*, 462 U.S. at 238, 103 S.Ct. 2317, and need not conclude that it was "more likely than not" that the evidence sought was at the place described, *see Texas v. Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). We have explained that "[d]irect evidence linking the place to be searched to the crime is not required for the issuance of a search warrant." *United States v. Hodge*, 246 F.3d 301, 305 (3d Cir. 2001). This is because "probable cause can be, and often is, inferred by considering the type of crime, the nature of the items sought, the suspect's opportunity for concealment and normal inferences about where a criminal might hide the fruits of his crime." *Id.*

In this case, Postal Inspectors described the following evidence to support search warrants for Bond's home and car: (1) the threats made by Bond to Haynes; (2) video coverage showing Bond stealing Haynes's mail, "placing a red powdery substance on the inside of ... Haynes's car muffler," and "going back and forth several times between her own car and ... Haynes's car"; (3) Bond's duties at Rohm and Haas and the report of the chemicals missing from its storage area; (4) Haynes's identification of Bond; (5) the inspectors' determination "that Carol Ann

Bond is the owner of the 2007 Saturn Ion silver or grey 4 Door Sedan"; and (6) the specific location of Bond's home. App. at 29-31. This represented "an accumulation of circumstantial evidence that together indicates a fair probability of the presence of contraband at the home [and vehicle] of the arrested." *Burton*, 288 F.3d at 103.[11]

In sum, because "the Government proffered sufficient evidence in the ... affidavit that there was a 'fair probability that contraband' would be found [in Bond's home and car], the warrant[s] [were] validly sought and approved, and we will not suppress the evidence that resulted from the search of that property." *Id.* at 105 (quoting *Gates*, 462 U.S. at 238, 103 S.Ct. 2317).

C. Appropriateness of "Special Skill" Sentence Enhancement

Bond's final challenge to the District Court's order concerns her two-level sentence enhancement under U.S.S.G. § 3B1.3 for using a special skill to facilitate the commission of a crime. She claims that

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[11] Bond's possession and use of significant quantities of toxic chemicals additionally gave rise to probable cause that she was keeping them in her home. *Cf. Hodge*, 246 F.3d at 306 ("It is reasonable to infer that a person involved in drug dealing ... would store evidence of that dealing at his home."); *United States v. Whitner*, 219 F.3d 289, 297 (3d Cir. 2000) ("[E]vidence associated with drug dealing needs to be stored somewhere, and ... a dealer will have the opportunity to conceal it in his home. After all, a dealer logically could conclude that his residence is the best, and probably the only, location to store ... large quantities of drugs....").

this enhancement "reflects a misapplication of the sentencing guidelines and constituted clear error by the sentencing court." Bond's Br. at 40. We disagree.

Section 3B1.3 of the Sentencing Guidelines provides for a two-level enhancement where "the defendant ... used a special skill ... in a manner that significantly facilitated the commission or concealment of the offense." "The purpose of this section is to add to the punishment of those who turn legitimate special skills to the perpetration of evil deeds." *United States v. Mainard*, 5 F.3d 404, 406 (9th Cir. 1993); *see also United States v. Young*, 932 F.2d 1510, 1513 (D.C. Cir. 1991). Thus, a sentencing court is required to make two findings before imposing an upward adjustment for use of a special skill: "(1) the defendant possesses a special skill; and (2) ... used it to significantly facilitate the commission or concealment of the offense." *United States v. Batista De La Cruz*, 460 F.3d 466, 468 (3d Cir. 2006).

The application note to § 3B1.3 defines "special skill" as "a skill not possessed by members of the general public and usually requiring substantial education, training, or licensing." It further states that examples of individuals with special skills "include pilots, lawyers, doctors, accountants, chemists, and demolition experts." U.S.S.G. § 3B1.3 app. n.4. "[A] § 3B1.3 sentence enhancement," however, "is not limited to persons who have received substantial formal education, training from experts, or who have been licensed to perform a special skill." *United States v. Urban*, 140 F.3d 229, 236 (3d Cir. 1998).

Bond argues that, despite her advanced degree in microbiology, she does not possess a special skill because she merely "was a low level technical analyst" at Rohm and Haas who "did not even use the two chemicals charged in the indictment." She emphasizes that "95% of the 20,000 chemicals [at Rohm and Haas] were listed on the company's computer where any employee could search the chemical by name, see where it was located, and 'go and borrow it.'" And she asserts that all Rohm and Haas employees "receive[d] safety training and learn[ed] how to read Material Safety Data Sheets ... [,] which are published for all chemicals available in the United States." Bond's Br. at 45.

These contentions fall far short of persuasive. With her degree and work experience, Bond has skills and knowledge "not possessed by members of the general public and usually requiring substantial education, training, or licensing." U.S.S.G. § 3B1.3 app. n.4. She is specifically trained in the development and application of biocides, which are defined as "poisonous chemical substance[s] that can kill living organisms." Webster's New World Dictionary 75 (1966). She also is competent in working with chemicals and researching them according to their labeled qualities. Taken together, these attributes constitute a "special skill" for purposes of U.S.S.G. § 3B1.3.

With regard to the second prong of the special skill enhancement test, use of a special skill "in a manner that significantly facilitate[s] the commission or concealment of the offense" is proven by "a *direct* use of the special skill." *United States v. Hickman*, 991 F.2d 1110, 1113 (3d Cir. 1993)

(emphasis in original). The First Circuit Court, for instance, held that a repairman of bank machines directly used his special skill when he caused the machines to malfunction in order to rob them. *See United States v. Aubin*, 961 F.2d 980, 984 (1st Cir. 1992). Even more pertinent, the Seventh Circuit Court held that a lab technician with a background in biology who ran a methamphetamine lab directly used his special skill in the commission of a crime. *See United States v. Fairchild*, 940 F.2d 261, 263-66 (7th Cir. 1991). The Court explained that the lab technician specifically had "used his knowledge of chemistry to purchase chemicals for his company, and put them together in the 'right combination' ... to make methamphetamine." *Id.* at 266.

Applying similar logic to Bond, it is apparent that she employed her special skill to select the unusually toxic chemicals she used against Haynes. In particular, her training and position allowed her to research and steal chemicals that were more toxic via topical exposure than ingestion. It also facilitated her handling and deployment of the chemicals. Additionally, it is unquestionable that Bond's special skill influenced her decision to use toxic chemicals as her weapon of revenge. Poisoning one's rivals, of course, is nothing new. But attempting to do so through the systematic application of 10-chloro-10H-phenoxarsine is not an approach typically taken by members of the general public. Rather, as the District Court concluded, it reflects the plan and actions of an individual trained in the use of biocidal chemicals.

The District Court accordingly did not err in assigning Bond a two-level sentence enhancement

for using a special skill "in a manner that significantly facilitated the commission or concealment of the offense." U.S.S.G. § 3B1.3. Bond's education and training constitute a special skill, and she directly used that skill committing her crime.

IV. Conclusion

Bond fell within the ambit of the federal chemical weapons statute by strategically employing toxic chemicals with the intent to harm Haynes. As a private party acting independently of a state, she lacks standing to challenge the constitutionality of this statute on the basis of the Tenth Amendment, and her claims that the statute is vague and overbroad fall short of the mark. Moreover, law enforcement personnel legally obtained the evidence that led to her indictment, and the special skill sentence enhancement that the District Court applied to Bond appropriately punished her offenses. For these reasons, we affirm the judgment of the District Court.

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 07-CR-528

UNITED STATES OF AMERICA

Plaintiff,

v.

CAROL ANNE BOND,

Defendant.

November 19, 2007

MOTIONS HEARING

Before: The Honorable James T. Giles,
United States District Court Judge

CERTIFIED TRANSCRIPTION
I DO HEREBY CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT OF THE ELECTRONIC-SOUND RECORDING OF THE PROCEEDINGS IN THE ABOVE-ENTITLED MATTER

/s/

Gail Drummond
June 20, 2008

Transcribed by: Drummond Transcription Service
Haddon Heights, NJ 08035

Proceedings recorded by electronic sound recording, transcript produced by computer-aided transcription service.

(at 10:44 a.m. in Courtroom 17A.)

DEPUTY CLERK: All rise.

The Honorable Judge James T. Giles presiding. Court is now in session.

THE COURT: Good morning.

MS. KURLAND: Good morning, your Honor.

MR. GOLDMAN: Good morning, your Honor.

THE COURT: Please be seated. Your appearances, please for the record?

MS. KURLAND: Good morning, your Honor. Amy Kurland for the U.S. Attorney's office for the Government.

MR. GOLDMAN: Robert Goldman for the defendant, your Honor, and Eric Reed from my office, also.

THE COURT: Good morning.

(Pause at 10:46 a.m.)

THE COURT: The defendant has a motion to dismiss the indictment -- at least certain counts, Counts 1 and 2 -- and alternatively to suppress the evidence that was seized from the car and from the home. You may speak on it.

* * *

THE COURT: The motion to dismiss is denied.

The motion to suppress the statement of Ms. Bond is also denied.

The statute which is challenged was enacted by Congress and signed by the President under the necessary and proper clause of the Constitution. It's clear that the intention was comply with the provisions of a treaty.

The treaty -- well, the statute and the treaty -- read almost identically and it covers the requirement upon a treaty member to enact a law through a constitutional process that would punish any person who uses a chemical weapon as it is intended by the treaty to be broadly interpreted for non-peaceful purposes, for any purpose that is not within the exemption or exemptions. The exemptions cover all of the legitimate peaceful purposes that a state or a treaty member could -- could have.

The commerce clause is not implicated because of the necessary and proper clause.

(Pause at 12:26 p.m.)

THE COURT: One could make an argument, of course, that there is a federal interest beyond the interest enumerated by Congress, but this court is bound to look only at the reasons for the enactment of the statute by Congress. Congress does not purport to enact the statute pursuant to the commerce clause.

The -- the statute is not vague, it is clear that if anybody uses a toxic chemical for other than peaceful purposes, the person can be prosecuted.

One doesn't have to know all the kinds of chemicals, one need only have to know that it is a

chemical that could do harm to another person's body and use it for purposes of harming or attempting to harm another person in the way in which that harm is described in the statute.

So, that the -- the plaintiff's -- the defendant's contention -- that the -- she was not on sufficient notice that she could be prosecuted under the statute is without merit.

The statement given by Ms. Bond was given after she was advised of her *Miranda* rights. It was done pursuant to an arrest warrant, the arrest warrant was executed before any search was completed or commenced, certainly, before Ms. Bond saw any search of her residence.

There is no evidence that she was asked any questions in the course of the arrest in her home. And there is no evidence that anything was done in her home pursuant to the arrest warrant, other than giving her an opportunity to change her clothes, consistent with the weather conditions and her having to leave the home and her being escorted out of the premises to the--the postal inspector's vehicle.

Handcuffs were not put on her -- the Court finds -- until she was about to enter the vehicle. She was not handcuffed in the house. She was not handcuffed on the way to the car, but at the car.

There is no evidence that the plaintiff (sic) did anything, except keep her head down, once she left the house, consistent with her not wanting to be seen or to see anything.

(Pause at 12:31 p.m.)

THE COURT: I find that the statement given pursuant to after her *Miranda* rights, was given knowingly and voluntarily according to her own statement.

Is there anything else?

MR. GOLDMAN: You -- did you not rule on the lawfulness of the search warrants, unless you wanted to take a look at those cases I cited.

THE COURT: Thank you.

I -- I find that the search warrants were properly issued.

The affidavits attached -- the affidavit -- attached to each search warrant, one for the car and one for the house of the plaintiff shows that the postal inspector was employed as a postal inspector for six years, that he was assigned to the Dangerous Mail Investigation Team, that his duties included investigation of suspicious mail containing dangerous powers, liquids, explosives, narcotics and other non-mailable substances discovered while in the mail system of the United States for private companies or postal customers residences.

The affidavit is detailed with respect to the control of the investigation, the investigation's direction by the affiant.

There's recitation about how the postal inspectors came to suspect Ms. Bond. There's information about -- detailed information about how Ms. Bond was known to a Ms. Haynes and to Clifford A. Bond. And Paragraph 4, for example, is not attacked in any way by the defendant.

There is also in the affidavit, detailed information pursuant to the investigation of the images resulting from the installation of a camera at the Haynes' home covering her home, her mailbox, door handle and car.

There is information about where the plaintiff -- the defendant -- had worked, how long she'd worked there, what her duties were, where the chemicals or the potassium dichromate was located in Rohm & Haas.

(Pause at 12:35 p.m.)

THE COURT: And Paragraph 16 or -- or 15 and 16 -- recite that the agent had determined that Carol Anne Bond is the owner of the car in question and the home.

It is reasonable that the issuing magistrate under the totality of the thoroughness of the affidavit would have concluded that this reads as I've determined as a result of the investigation that Carol Anne Bond is the owner of the car and that she lives where the address is recited, not only because of the position of the affiant, but because of the -- the obviousness of the identification of the vehicle and the place where she lives. The investigation of Rohm & Haas -- through Rohm & Hass -- certainly would have determined where she lived.

Investigation of -- with respect to -- where her husband lived would have shown where she lived and as the investigation relative to Ms. Haynes would have shown where she lived. And there is no dispute that she, in fact, lived where she is -- where she was claimed to have been determined to have

lived or that she was the owner of the vehicle. It would have been reasonable, expectable that investigation would have shown the ownership of the vehicle.

The large amount of chemicals alleged to have been taken by the defendant gave the postal inspector probable cause to believe that the unaccounted for chemicals would be found at a place where Carol Anne Bond lived, worked or controlled. She controlled the vehicle that she owned and she had the ability to control spaces where she -- where she lived.

The amount of the potassium dichromate associated with what was ascertained to have been the weight of what was deposited on the mailbox and on the car was far less than the four pounds of potassium dichromate missing from Rohm & Haas, leading to the probable cause conclusion that a substantial amount of potassium dichromate would probably be found in her vehicle or where she lived.

So, the judicial officer who approved the search warrants having considered the totality of the search warrants, would have reasonably and constitutionally approved a warrant for -- a search warrant -- for 1963 Ryan's Run, Lansdale, Pennsylvania, which is described in the warrant and the vehicle which is described in the application and the affidavit for the warrant -- for the search warrant.

I think the -- there is a -- a description --

(Pause at 12:40 p.m.)

THE COURT: -- of the house in the application and the affidavit for the search warrant.

The defendant argues that there was an obligation to identify all of the particulars of the investigation for the statement of determination of where the plaintiff lived or how she came to -- how it was that she was the owner of the Saturn.

I find the content of the affidavits -- the contents -- reasonably show that there was determination through the ordinary processes of investigation, the investigation that was described in the affidavits.

Anything else?

MS. KURLAND: Not from the Government, your Honor.

THE COURT: All right.

Do we have a trial date?

MR. GOLDMAN: December 10th.

For the Court's benefit, it's never been the contention of Ms. Bond to fight this case on the facts. I felt it was an obligation on my part with -- given the -- I thought -- unique constitutional issues dealing with the chemical weapons statute to raise these issues for the Court's consideration.

And, in fact, we were prepared to go to the state authorities and plead guilty to the -- to the facts of this case.

I'm saying this to you because what I'm covering with -- and we've started discussing this before with Ms. Kurland was -- that this either be a -- *Zudic* plea, reserving the right, perhaps, to raise the issues

raised today to the appellate court, should we decide that important to do.

And the reason -- so the Court knows -- there's a dichotomy here between decisions which I felt that I needed to do as counsel for Mrs. Bond versus her acceptance of the facts of this case.

THE COURT: I understand that.

MR. GOLDMAN: And -- and given particularly because the sentencing guidelines since they focus on the real intent of the statute, I would -- is eight years in jail.

And I did some looking at the guidelines -- you could assault Senator Spector in the parking lot, you know, with a baseball bat and the guidelines are less than Ms. Bond faces. So --

THE COURT: I don't know if you would -- that that's a proper analogy.

MR. GOLDMAN: Well, I know, I've -- but that shows you how -- how -- in my mind -- where the Government really intended the statute to focus on, but --

THE COURT: Well, I don't know what the sentencing guidelines provide, that's not my issue, either we're going to have a trial date or --

MR. GOLDMAN: We're going to resolve --

THE COURT: -- we're not.

MR. GOLDMAN: -- this case, your Honor. I'm trying to -- I need to find out from the Government whether or not they will take a *Zudic* plea.

If they won't take a *Zudic*, then what this would be is a five-minute stipulated fact waiver trial to the Court, which in essence, is a guilty plea just preserving those legal issues.

So, we could set this for a date certain and it should take no longer than a typical guilty plea, one way or the other, I need to find out from Ms. Kurland, if the Government will accept.

THE COURT: The 10th is a Monday.

Then, how about December 6th which is a Thursday?

MR. GOLDMAN: May I check my calendar, your Honor?

(Pause at 12:44 p.m.)

MS. KURLAND: Your Honor, I don't have my calendar with me, I assume that that date is good, but if --

THE COURT: Well, you can check when you get back --

MS. KURLAND: Very good.

THE COURT: -- on -- on December 6th and a time. I haven't looked at my calendar either, but we'll set that for in a proffer of a guilty plea. Because if a jury has to be called in for this case, it will have to be done on Thursday afternoon and Friday.

So, to avoid calling in a jury when a jury doesn't have to be called in, we'll do it on the 6th, if we can or the 5th.

I'm not superstitious about Friday the 7th, but that's Pearl Harbor Day.

(Pause at 12:45 p.m.)

(Discussion held off the record.)

THE COURT: There being nothing else, we stand adjourned. The defendant remains in custody.

MR. GOLDMAN: Thank you, your Honor.

MS. KURLAND: Thank you, your Honor.

(Adjourned in this matter at 12:46 p.m.)

Appendix D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 07-528

UNITED STATES OF AMERICA

Plaintiff,

v.

CAROL ANNE BOND,

Defendant.

November 19, 2007

ORDER

AND NOW, this 19th day of November, 2007, it is hereby ORDERED that Defendant's Motion to Suppress Evidence (Docket No. 24), Defendant's Motion to Dismiss Counts I and II of the Indictment (Docket No. 27), Defendant's Motion to Suppress Statements, and all responses thereto, are DENIED for the reasons stated by the court at the record hearing held this date in the above-captioned matter. The court reserves the right to edit, change, or otherwise elaborate upon the stated reasons, consistent with the rulings announced.

BY THE COURT:
/s/ James T. Giles
JAMES T. GILES, J.

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

No. 07-00528-01

UNITED STATES OF AMERICA

Plaintiff,

v.

CAROL ANNE BOND,

Defendant.

PRESENTENCE INVESTIGATION REPORT

Prepared For:	THE HON. JAMES T. GILES U.S. District Court Judge
Prepared By:	Alexander T. Posey Senior U.S. Probation Officer 610-320-5166

Assistant U.S. Attorney	**Defense Counsel**
Paul G. Shapiro	Robert E. Goldman
615 Chestnut Street	Fox Rothschild, LLP
Suite 1250	2700 Kelly Rd. Ste. 300
Philadelphia, PA 19106	Warrington, PA 18976
215-861-8325	215-918-3550
	Designation: Retained

Sentence Date:	June 3, 2008
Offense:	Counts One and Two: Using a chemical weapon 18 U.S.C. § 229(a) Up to

	life imprisonment/$250,000 fine, Class A felonies Counts Three and Four: Theft of mail 18 U.S.C. § 1708 Five years / $250,000 fine, Class D felonies
Arrest Date:	June 8, 2007, by the U.S. Postal Inspectors Service, Philadelphia, Pennsylvania
Release Status:	The defendant is in federal custody.
Detainers:	None.
Codefendants:	None.
Related Cases:	None.
Date Report Prepared:	February 5, 2008
Date Report Revised:	May 16, 2008
Identifying Data:	
Birth Name:	Carol Anne Atwell
Date of Birth:	December 6, 1970
Age:	37
Race:	Black, Non-Hispanic
Sex:	Female
SSN No:	XXX-XX-XXXX [Redacted]
FBI No:	732221RC2
USM No:	61301-066

Other ID No:	XXXXXXXXXX [Alien Registration No.] [Redacted]
PACTS No:	029597
Education:	Two masters degrees
Dependents:	None
Citizenship:	Naturalized U.S. citizen
Legal Address:	1963 Ryans Run, Lansdale, PA 19446
Current Address:	Federal Detention Center P.O. Box 562 Philadelphia, PA 19105
Aliases:	Carol Bond (surname by marriage) Carol Anne Bond (as indicated) Carol Anne Atwell (maiden name) "Betty" Bond (nickname) Carolanne L. Bond (as it appears on credit report) Carol-Anne L. Bond (as it appears on police reports)

* * *

PART A. THE OFFENSE

Charge(s) and Conviction(s)

1. Carol Anne Bond was named in a four-count Indictment returned by a federal grand jury sitting in the Eastern District of Pennsylvania on

September 5, 2007. The Indictment charged Bond with two counts of using a chemical weapon, in violation of 18 U.S.C. § 229(a) **[COUNTS ONE and TWO]**, and theft of mail, in violation of 18 U.S.C. § 1708 **[COUNTS THREE and FOUR]**.

2. Pursuant to Federal Rule of Criminal Procedure 11, the parties have entered into a written plea agreement that contains certain provisions and stipulations. On December 5, 2007, in accordance with that written plea agreement, Carol Anne Bond appears in U.S. District Court for the Eastern District of Pennsylvania before the Honorable James T. Giles and entered a guilty plea to Counts One, Two, Three and Four of the Indictment, arising from the defendant's use of toxic chemicals against another individual and her theft of mail from that same individual.

3. The instant offense occurred in or about November 2006 and June 7, 2007; therefore, both the Sentencing Reform Act of 1984 and the Antiterrorism and Effective Death Penalty Act of 1996 apply. The edition of the Sentencing Guidelines Manual used to calculate the guidelines in the report is that incorporating amendments effective May 1, 2008, as there are no ex post facto concerns.

Plea Agreement Information

4. The terms of the written plea agreement are summarized as follows:

    a. The defendant agrees to pay the special victims/witness assessment in the amount

of $400 at such time as directed by the Court.

5. The U.S. Attorney's Office and the defendant have agreed to the following stipulations under the Sentencing Guidelines Manual effective November 1, 2007. Pursuant to U.S.S.G. § 6B1.4, these stipulations are not binding upon this Court:

    a. As of the date of this agreement, the defendant has clearly demonstrated a recognition and affirmative acceptance of personal responsibility for the offense charged. Therefore, a downward adjustment of two levels for acceptance of responsibility is appropriate if the defendant's acceptance of responsibility continues through the date of sentencing. (U.S.S.G. § 3E1(a))

    b. As of the date of this agreement, the defendant has timely notified authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently. Therefore, a downward adjustment of one additional level is appropriate. (U.S.S.G. § 3E1.1(b)(2))

6. The parties agree under Rule 11(a)(2) that in entering into this agreement, the defendant reserves the right to appeal the Court's ruling on the defendant's pre-trial motion to dismiss the indictment and the defendant's pre-trial motion to suppress evidence.

Pretrial Adjustment

7. The defendant is detained and has not been under the supervision of the U.S. Pretrial Services Office.

Status of Codefendants

8. There are no codefendants in this case.

Related Cases

9. There are no related cases.

The Offense Conduct

Factual Background

10. On March 5, 2007, the U.S. Postal Inspection Service received a complaint from Myrlinda Haynes, a resident of 24 Zummo Way, Norristown, Pennsylvania. Ms. Haynes told the inspectors that someone was placing chemicals into her mailbox, on her mail, on her front door, and on her vehicle's doors. Ms. Haynes suspected Carol Anne Bond, because Bond is married to Clifford A. Bond who is the father of Ms. Haynes' two-year old child through an extra marital affair. According to Ms. Haynes, approximately two years ago, Carol Anne Bond phoned Haynes and stated something to the effect of "I going to make your life a living hell," and "dead people will visit you." Thereafter, Ms. Haynes reported receiving harassing letters and phone calls.

11. The Norristown Police Department received multiple reports from Ms. Haynes that she was being harassed by Bond. It is noted that Bond

was convicted on a charge of harassment against Ms. Haynes in Magisterial District Court 38-1-16 in Montgomery County, Pennsylvania, in 2005. Ms. Haynes stated that the first incident involved chemicals being placed on her vehicle was during the Thanksgiving holiday of 2006.[1] The second incident involving chemicals occurred during the weekend of February 24, 2007. Ms. Haynes photographed the red powdery substance. She also documented every time she noticed any form of chemicals on her front door, mailbox, and vehicle.

12. On March 14, 2007, U.S. Postal inspectors went to Ms. Haynes' residence to screen the chemical. They also installed a video camera at Ms. Haynes home, positioned to view the outside of her home, including her mailbox, door handle and car. On April 12, 2007, at approximately 7:30 a.m., the video camera captured an African American female stealing mail from Ms. Haynes' mailbox. The mailbox is mounted on the outside brick wall. The female was observed opening the mailbox, retrieving mail from inside, examining the mail, and removing a business size envelope. The female then left the vicinity with the envelope. This theft of mail is the basis for Count Four of the Indictment.

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[1] It is noted that the Norristown Police Department received a complaint from Ms. Haynes on November 12, 2005, regarding an unidentified substance upon the driver-side front windshield, the driver-side door window, and the driver-side door handle.

13. On May 23, 2007, at approximately 10:28 p.m., the video camera installed at Ms. Haynes' home again captured the same female placing a red powdery substance on the inside of Ms. Haynes' car muffler, which was parked on a marked parking spot #24 on Zummo way. The female is observed going back and forth several times between her own car and Haynes' car. The red powdery substance is visible on the ground underneath the vehicle's muffler and inside of the muffler's tail pipe.

14. Ms. Haynes reviewed the videotape of May 23, 2007, and a photo-spread that contained a photograph of Carol Anne Bond. She identified Bond as the person who placed the chemical substance in her vehicle's muffler. Ms. Haynes also reviewed the videotape of April 12, 2007, and again recognized Bond as the female who stole her mail from her mailbox. Bond had worked at Rohm and Haas at the Spring House Technical Center from December 11, 2000 to November 2, 2006. During those six years, Bond was employed as a level 5 technical assistant in the CIS / Biocides organization. Bond's responsibilities included microbiological challenge testing on plastics samples and some routine analytical work including, high pressure liquid chromatography (HPLC), at the time of her resignation.

15. During the time Bond worked in Spring House building, there was an inventory entry for five pounds of potassium dichromate in building 4B for Dr. Broughton. According to Dr. Broughton, only one pound of potassium dichromate was left

from the original five pounds, and the Potassium dichromate was stored at the "common storage locker area" to which Carol Anne Bond had access. Dr. Broughton stated that he used a very small amount of the original five pounds of potassium dichromate, an amount far from the weigh of the four pounds that is currently missing. Bond did not have authorization to remove any chemicals from Rohm and Haas.

16. According to Rohm and Haas Lab Director Dr. David Greenley Chemical Engineer, potassium dichromate is highly toxic and, if ingested, may cause death. On June 8, 2007, agents with the U.S. Postal Inspection Service arrested Bond and executed search warrants on her house and her car. Agents discovered a piece of stolen mail in Bond's house, with a postmark of February 26, 2007, and an additional tube of chemical in her car. The piece of stolen mail is the basis for Count Three of the indictment.

17. Bond admitted that she took the chemicals from Rohm and Haas when she had been employed there.[2]

The Chemicals

18. Two separate chemicals were analyzed. The first chemical was a red powdery substance which was

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[2] It is noted that the defendant contends that she was not responsible for all four pounds of potassium dichromate missing from Rohn and Haas. Instead, she reportedly acquired potassium dichromate from an internet website. This is the only fact of the case contested by the defendant.

found on the door handle and in the muffler of Ms. Haynes' car, and on the mailbox and the front door handle of Ms. Haynes' residence.[3] The second chemical was a white substance that was also found on the door handles of Ms. Haynes' residence and car. Additionally, a tube containing the same white substance found in Bond's car.

19. The red powdery substance was sent to the laboratory for examination. Robert Moberley, Senior Forensic Chemist, U.S. Postal Inspection Service, Forensic Laboratory Service, determined that it was potassium dichromate, which is a strong oxidizer and extremely destructive to tissues of the mucous membranes and upper respiratory tract. Potassium dichromate may also cause ulceration and perforation of the nasal septum, may produce pulmonary sensitization or allergic asthma, and higher exposures may cause pulmonary edema. If potassium dichromate is ingested is may cause severe burns of the mouth, throat, and stomach, leading to death. Any skin contact may cause redness, pain, and severe burn, and if exposed to broken skin it may cause ulcers (chrome sores) and absorption, which may cause systemic poisoning, affecting kidney and liver functions. Potassium dichromate is highly toxic and if absorbed through the skin may cause death. The weight count for the potassium

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[3] The red powder was also found spilled on the ground below the muffler of Ms. Haynes' vehicle. In addition, a black fabric cloth filled with the red powder had been stuffed into the muffler of the vehicle.

dichromate sent to the lab on this case was approximately 28 grams. The remaining amount of potassium dichromate, that is approximately four pounds, is still missing. The use of the toxic chemical potassium dichromate as a weapon is the basis for Count One of the Indictment.

20. The white powdery substance was sent to the Pennsylvania State Police laboratory, Bureau of Forensic Services. Forensic Scientist Susan Atwood determined that the white powder contained arsenic, a toxic chemical. The white powder was a specialty chemical called 10-cholo-10Hphenoxarsine. It is a precursor material used to prepare a commercial biocide product and is toxic. Absorption through the skin may be fatal. This material is not available to the general public. Dr. David Greenley looked into the history of the chloro-phenoxarsine materials as it a specialty chemical and traceable, almost like a fingerprint. Dr. Greenley traced the sample back to the Morton Company located in North Andover, Massachusetts, in 1997. Rohm and Haas acquired Morton in 1999. The chemist responsible for the chemical possessed it for almost ten years and brought it with him when Rohm and Haas relocated him for employment from Massachusetts to Spring House, Pennsylvania. The use of the toxic chemical 10-cholo-10Hphenoxarsine as a weapon is the basis for Count Two of the Indictment.

21. It is noted that a third, non-toxic chemical, identified as glycacil, was recovered from Bond's 2007 Saturn Ion during a search of the vehicle following the defendant's arrest. The glycacil was

also determined to have been taken from Rohm and Haas. The glycacil was found in the glove compartment on the vehicle package in a glass container commonly found at Rohm and Haas's Spring House laboratory. It is noted that small particles of potassium dichromate were also located in the glove compartment, center console, and on the floor behind the driver's seat of Bond's vehicle.

Victim Impact

22. The Antiterrorism and Effective Death Penalty Act of 1996, including the Mandatory Victims Restitution Act of 1996, applies to this case and restitution is required.

23. Ms. Myrlinda Haynes, her child, and Rohm and Haas are identified as the victims in the instant offense. Rohm and Haas suffered some financial loss associated with the stolen chemicals. However, Dennis O. Wilson, on behalf of Rohm and Haas, advised the probation officer in a letter, dated March 3, 2008, that "Rohn Haas appreciates the opportunity to seek restitution in this matter" but has "determined not to do so." Therefore, Rohm Haas has declined "to provide a declaration of victim losses or a victim impact statement."

24. Ms. Haynes informed U.S. Postal Inspectors that she was burned once by the chemicals planted on her front door. She experienced a burning sensation on her thumb which required repeated rinsing with water to subside. This is the only instance where one was injured by the chemicals. However, it is not only the damage inflicted upon

Ms. Haynes. Ms. Haynes sold her home in Norristown, Pennsylvania, and moved to a new location due to the fear she continued to experience in her home. The Victim/Witness Services for the U.S. Attorney's Office assisted Ms. Haynes with some of the financial cost associated with her move. It is noted that Ms. Haynes is expected to address the Court at the time of sentencing.

25. The probation officer interviewed Ms. Haynes on February 20, 2008. Ms. Haynes related the frustration she experienced in having anyone take her seriously about the chemicals she found repeatedly on her car. She struggles with paranoia, not just for herself, but also for her daughter, fearful that the events of the instant offense will resurface and she will be hurt. She wishes to be the person she once was and pursue counseling. However, she has found the cost prohibitive. Meanwhile, friends have lent her emotional and family support. Ms. Haynes also furnished this officer with an affidavit of losses. She estimated that her out-of-pocket expenses are at least $17,030.97. Ms. Haynes' expenses included at least twenty-one car washes, valued at $12.99 per wash, and a full interior and exterior cleaning, valued at $179.00, after receiving her vehicle back from the U.S. Postal Inspection Service in order to remove all chemicals from the car. Ms. Haynes also had her daughter tested for any contamination, resulting in $345.50 in medical related expenses. She informed that her daughter suffered no ill effects from the instant offense. Ms. Haynes also moved

from the home in which she had been living. She did not profit from the sale of her home. Instead, she incurred other expenses, exceeding $16,000, from the home's sale and her subsequent move to a new residence. Ms. Haynes' wrote the following statement on the affidavit which sums-up her experience:

> "I'm a single, black female who was able to purchase a home on my own. But due to the turmoil and ordeal that Carol-Ann Bond put my daughter and I through, I was forced to sell my home of five and a half years. I'm now living in a small apartment, where the rent is much higher than my mortgage was and my utilities are twice the amount they used to be. I'm financially exhausted and therefore, I'm unable to purchase another home for my daughter and myself."

Adjustment for Obstruction of Justice

26. The probation officer has no information suggesting that the defendant impeded or obstructed justice.

Adjustment for Acceptance of Responsibility

27. The defendant, through counsel, conveyed her agreement with the factual basis for the guilty plea with the exception that she was responsible for the theft from Rohm and Haas of the additional four pounds of potassium dichromate that remains missing. The defendant admitted that she stole Ms. Haynes' mail and laced Ms. Haynes' front door and car with chemicals. The

defendant then provided a historical background of her relationship with Ms. Haynes.

28. The defendant described Ms. Haynes as a family friend who became like a sister to her and her family. They spent a great deal of time together, vacationing, shopping, and at holiday celebrations. During the time of their friendship, the defendant married her husband, Clifford Bond. The defendant's husband and Ms. Haynes also developed a friendship. However, the defendant was bothered at the nature of their relationship, noting that they had grown too close together by 2000. The defendant mentioned that her husband was more sensitive than her with Ms. Haynes, and that he was better suited to talk with Ms. Haynes about her problems, struggles, etc. The defendant wanted them separated for fear it would lead to a more intimate relationship.

29. The relationship between the defendant's husband and Ms. Haynes soured her friendship with Ms. Haynes. However, they continued to be friends. The defendant said she was overjoyed for Ms. Haynes upon learning that she had become pregnant. The defendant noted that Ms. Haynes had endured miscarriages before. The defendant even noted said she had been helping Ms. Haynes prepare for her to have her first child before learning that her husband was the father. The defendant was told of the affair by her husband. Even so, the defendant already suspected it based upon an earlier conversation with her sister. The defendant found the news very difficult to accept, but she did not directly confront Ms. Haynes

about it. The defendant contends that she did not have intent to bring about Ms. Haynes' death.

30. The defendant was interviewed by the U.S. Postal Inspector on June 7, 2007, at the time of her arrest. The U.S. Postal Inspector noted that the defendant seemed more concerned with her career and her future move to California than answering questions posed to her regarding the instant offense. The U.S. Postal Inspector queried the defendant about the whereabouts of any of the remaining chemicals, namely the missing pounds of potassium dichromate. The defendant could not articulate precisely where the potassium dichromate was disposed but said it had been disposed of properly where no one would be harmed. The U.S. Postal Inspector also queried the defendant if her actions in the instant offense were intended to bring harm to or kill Ms. Haynes' child. The defendant said she believed the red powder was an irritant that would cause a rash or irritate the skin. She did not address the U.S. Postal Inspector's questions about harming or killing Ms. Haynes' child.

31. The defendant's agreement with the facts of the case, notwithstanding her contention that she took the additional four pounds of potassium dichromate, and her statement to the probation officer about why she concocted this plan meets the minimal requirements for acceptance of responsibility. The offense level will be reduced two levels, pursuant to U.S.S.G. § 3E1.1(a). The additional one-level reduction to the offense level, pursuant to U.S.S.G. § 3E1.1(b), is also applicable as per the parties stipulation.

Offense Level Computation

32. The May 1, 2008, edition of the Guidelines Manual has been used in this case due to no ex post facto concerns.

Counts One and Two - Using a chemical weapon

Counts Three and Four - Theft of mail

33. The defendant's theft of mail, as charged in Counts Three and Four, may or may not have been related to the defendant's use of a chemical weapon, as charged in Counts One and Two. For one reason or another, the defendant stole Ms. Haynes' mail on at least two occasions. In any case, Counts Three and Four are grouped as closely related counts, pursuant to U.S.S.G. § 3D1.2(d), as both offenses are covered by U.S.S.G. § 2B1.1.

34. Counts One and Two are grouped as closely related counts, pursuant to U.S.S.G. § 3D1.2(b), as both counts involved Ms. Haynes as the victim, and the defendant used a chemical weapon on multiple occasions between November 2006 and June 7, 2007, as a means of carrying out her criminal objection, bringing harm to Ms. Haynes.

35. The group with Counts One and Two and the group with Counts Three and Four are further grouped, pursuant to U.S.S.G. § 3D1.2(b). The determination of the offense level, and ultimately the guideline range of imprisonment, is no different than if the guideline calculations were completed for each group collectively or separately. For simplicity, all of the counts were

grouped together despite a question as to how theft of the mail related to using a chemical weapon. Counts One and Two are the most serious counts of the group. Pursuant to U.S.S.G. § 3D1.3(a), the offense level is determined for the count in the group resulting in the highest offense level.

36. **Base Offense Level:** The United States Sentencing Commission Guideline for violation of 18 U.S.C. § 229(a) is found in U.S.S.G. § 2M6.1 and calls for a base offense level of 28 under subsection (a)(2). 28

37. **Specific Offense Characteristic:** The offense involved the use of a toxic chemical. However, it was not a toxic chemical found in Schedule I of the Annex of Chemicals to the Chemical Weapon Convention (Application Note 1 in U.S.S.G. § 2M6.1). Therefore, the upward adjustment to the offense level, pursuant to U.S.S.G. § 2M6.1(b)(1), is not applicable. 0

38. **Specific Offense Characteristic:** It is possible that the offense was tantamount to attempted murder. The defendant purposely placed the toxic chemicals potassium dichromate and 10-cholo-10Hphenoxarsine on the handles of her car and front door, places where Ms. Haynes would place her hand and expose her to the toxins. Pursuant to U.S.S.G. § 2M6.1(c)(2), the guideline for U.S.S.G. § 2A2.1 (Assault with Intent to Commit Murder; Attempted Murder) should be applied if the resulting offense level is greater than

that determine above. In this case, an argument could be made that the base offense level could be 33 under U.S.S.G. § 2A1.2(a) if the object of the offense would have constituted first degree murder. It appears that the defendant purposefully placed the toxic chemicals in places where Ms. Haynes would expose herself to it. The defendant contends that she did not wish to murder Ms. Haynes as a means of retribution. The government's evidence does not contradict this statement. Therefore, it appears that the best approach to determining the offense level is to forego the cross reference to U.S.S.G. § 2A2.1.[4] 0

39. **Victim Related Adjustments:** Ms. Haynes' child could also have been injured or killed in the instant offense should the child had touched, inhaled, or ingested the potassium dichromate or the 10-cholo-10Hphenoxarsine. Ms. Haynes' child could be viewed as a vulnerable victim, pursuant to U.S.S.G. § 3A1.1. However, as the child was not injured in the instant offense, and it is not certain if

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[4] The defense contends that the "discussion on enhancements that no one suggests are application in this case" is not warranted in the presentence report and objects to this paragraph for its inclusion. The probation officer respectfully disagrees. The inclusion of this "discussion" shows the Court that the probation officer did consider the particular adjustment, be it upward or downward, but rejected it. The Court should be aware of whether or not meaningful thought was made in the completion of the presentence report.

Ms. Haynes' child was targeted, the probation officer elected not to apply the enhancement.[5] 0

40. **Adjustments for Role in the Offense:** The defendant was employed at Rohn and Haas prior to the time frame of the instant offense. The defendant has access to the toxic chemicals used in the instant offense during the time of her employment at Rohm and Haas. Furthermore, the defendant has admitted that she took chemicals from Rohm and Haas when she had been employed there as a level 5 technical assistant in the CIS / Biocides organization. It is noted that the defendant's responsibilities included microbiological challenge testing on plastics samples and some routine analytical work including, high pressure liquid chromatography (HPLC), at the time of her resignation. Due to her work at Rohm and Haas, she had routine, unfettered, access to the toxic chemicals (i.e., the chemical weapon) she later utilized against Ms. Haynes. The removal of the chemicals was difficult to detect as no record was kept at Rohm and Haas was kept to sign-out the chemicals. The defendant also possessed a sufficient degree of

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[5] For the same aforementioned reasons cited in Footnote 4, the defense objects to the discussion of a victim-related adjustment in paragraph 39. Again, the probation officer respectfully disagrees. The inclusion of this "discussion" shows the Court that the probation officer did consider the particular adjustment but rejected its application.

authority with a reliance of integrity as it was routine for her to access and use the chemicals. It also demonstrates her use of special skill as a trained microbiologist. The defendant understood the effect the chemical could have a person. The average individual, including the victim, does not understand the possible effects that certain chemicals could have on a human being. Pursuant to U.S.S.G. § 3B1.3, two levels are added for the defendant's abuse of her position of trust and use of a special skill. +2

41. **Adjustment for Obstruction of Justice:** None. 0

42. **Adjusted Offense Level (Subtotal)** 30

43. **Adjustment for Acceptance of Responsibility:** Pursuant to U.S.S.G. § 3E1.1(a), the offense level is reduced by two. -2

44. **Additional Adjustment for Acceptance of Responsibility:** Pursuant to U.S.S.G. § 3E1.1(b), the offense level is reduced by one additional level. -1

45. **Adjusted Offense Level:** 27

46. **Chapter Four Enhancements:** None. 0

47. **Total Offense Level:** 27

PART B. DEFENDANT'S CRIMINAL HISTORY

Juvenile Adjudication(s)

48. The defendant was a resident of Barbados until the age of 25. Therefore, any juvenile history in

the defendant's native country could not be verified.

Adult Criminal Conviction(s)

49. NOTE: Pennsylvania State Law, adopted November 29, 1972, requires the assignment or knowing waiver of counsel for all indigent defendants.

50.

Date of Arrest	Conviction/ Court	Date Sentence Imposed/ Disposition	Guide Pnt -lines
09/05/2005 (Age: 34)	Count One: Harassment/ Magistrate District Court 38-1-16, Montgomery County, Pennsylvania, Docket No. NT-1206-05 and Court of Common Pleas, Criminal Division for Montgomery County, Pennsylvania, Docket No. CP-46-SA-	11/02/2005: Found guilty after trial, sentence to pay a $100 fine and court costs. 12/09/2005: Summary appeal filed with the Court of Common Pleas, Criminal Division for Montgomery County, Pennsylvania. Assigned Docket No. CP-46-SA-3137-2005. 02/08/2008:	§ 4A1. 1(c) +1

3137-2005	Summary appeal trial held, found guilty upon withdrawal of summary appeal. Sentenced to pay a $100 fine and court costs.

51. The citation states that the defendant continually harasses the victim, Myrlinda Haynes, with phone calls and letters, annoying the victim. A supplemental report completed by the Norristown Police Department notes that Ms. Haynes had come to the police station to file the complaint against the defendant. She showed the Norristown Police Department the letters and pictures she received. The pictures depicted Ms. Haynes' face cut by some type of straight edge. Ms. Haynes also noted that her co-worker at her place of employment received a phone call from someone who claimed to be the defendant's cousin. The person made disparaging remarks about Ms. Haynes in an attempt to have her fired. Lastly, Ms. Haynes produced a Bible she received which had been marked in different areas in attempt to make her feel guilty about her affair with the defendant's husband.

Criminal History Computation

52. The total of the criminal history points is one. According to the sentencing table at U.S.S.G. Chapter 5, Part A, one criminal history point establishes a criminal history category of I.

Other Criminal Conduct

53. None.

Pending Charges

54. None.

Other Arrests

55. None.

PART C. OFFENDER CHARACTERISTICS

Personal and Family Data

56. The defendant was born Carol Anne Atwell on December 12, 1970, in Bridgetown, Barbados. She is the only child born to the paramour union of Sandra (nee Bryan) and Anthony Atwell. The defendant believes that her parents married when she was approximately six years old but had co-habitated beforehand. The defendant was reared by both parents until the age of eleven. The defendant's parents then divorced. Afterwards, the defendant continued to live with her mother and half-sister Sonya.

57. The defendant said her father continued to have regular contact with the family until she was seventeen years old. He then relocated to the United States. The defendant last saw her father approximately 15 years ago. She has heard that he remarried and fathered additional children, but this is not verified. The defendant does not know his present whereabouts. The defendant's mother is now in her mid-fifties. She lives in the United States with her daughter, Sonya, and is employed as a certified nursing assistant at the Phoenixville Hospital. Sonya (nee Bryan) Forde,

is 40 years old and lives at 133 Fairview Avenue, Trooper, Pennsylvania, with her husband. Sonya and the defendant have the same mother. The defendant enjoys a good relationship with both her mother and her sister.

58. The defendant remained in Barbados until 1995. She then immigrated to the United States, entering via Philadelphia, and shared a residence with Sonya and her husband in the 700 block of Stafford Street in Philadelphia, Pennsylvania. The defendant lived with Sonya for approximately two years at this address. The defendant was also married during this time frame. On October 25, 1996, she wed Clifford Bond. The defendant noted that she originally met Clifford in Barbados. Clifford is 38 years old and employed as a computer specialist by Rohn and Haas at its 6th and Market Street location in Philadelphia, Pennsylvania. The defendant and Clifford lived with Sonya and her husband for a short period of time after marrying. They later moved into their first home at 618 8th Avenue, Lindenwold, New Jersey, in 1997. The defendant lived at this address for approximately four years.

59. The defendant informed that she and Clifford sold the Lindenwold property in 2001 and moved to 1963 Ryans Run, Lansdale, Pennsylvania. They have lived here for the past six years. The defendant does not have any children with Clifford or any other man. She informed that she is the adoptive parent of her younger brother, Hugh Alexander ("Alex") Grannum. The defendant said she and her husband adopted

Hugh six years ago, about the same time they moved to Lansdale, Pennsylvania. Alex has a different father than the defendant and her sister, Sonya. The defendant that her mother was unable to support him. She believed that she and her husband could provide a better life and a better education for him, as well as make it easier for him to become a naturalized U.S. citizen. Alex is now 19 years old and employed as an auto body technician. He continues to live with the defendant's husband at 1963 Ryans Run, Lansdale, Pennsylvania.

60. The defendant's husband fathered a child named Gabrielle Haynes through a paramour union with Myrlinda Haynes. Gabrielle is now two years old.[6] She lives with her mother in Montgomery County, Pennsylvania. It is noted that the defendant's husband is responsible for paying support to Ms. Haynes via court order. The affair between the defendant's husband and Ms. Haynes severed the relationship she had with Ms. Haynes and has greatly impacted her marriage. The defendant said they did attend three sessions of marital counseling. She could not recall the name of the counseling office. The probation officer later learned and confirmed that

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[6] During the probation officer's interview of Ms. Haynes on February 20, 2008, she said Clifford Bond pressed her to abort the child. She refused and noted that the defendant actually encouraged her to have the child. Ms. Haynes has no contact with Clifford Bond regarding the welfare of their child. She added that he has shown no interest in knowing his child.

the defendant attended these counseling sessions with Louis Baldino, a psychologist in Harleysville, Pennsylvania. The defendant also said they continued to live together and are still legally married. The defendant questioned whether or not the married will survive. Meanwhile, she maintains regular contact with her husband via personal visits and phone calls.

61. The probation officer interviewed the defendant's husband, Clifford Bond, on January 23, 2008. Mr. Bond informed that he was born in New York and raised there until the age of nine. He then moved with his family to Barbados, where he spent the next seventeen years. Mr. Bond met the defendant while in Barbados. They began dating almost twenty years ago. Mr. Bond confirmed the date and place of his marriage to the defendant and that they have lived in the United States since the mid-1990s.

62. Mr. Bond was visibly upset discussing the instant offense, oftentimes casting blame upon himself for the defendant's actions. He acknowledged his love for the defendant and repeatedly referred to the shame he felt for the pain he caused the defendant over the affair with Ms. Haynes. Mr. Bond described Ms. Haynes in similar terms as the defendant, noting that she was like a sister to the defendant's family. He, too, no longer speaks with Ms. Haynes. Mr. Bond stated that he made a decision to forego any further relationship with Ms. Haynes in order to salvage his marriage with the defendant. Ms. Haynes did not take lightly to his decision. He currently is not permitted to have any contact with their daughter, Gabrielle.

However, he is court-ordered to pay child support.[7] Mr. Bond noted that he and the defendant discussed divorcing, but instead committed themselves to working through the infidelity.

63. Mr. Bond spoke very fondly of the defendant. He described her as a warm, caring, and loving individual. The person who committed the instant offense is not the woman he has come to know and love over the past twenty years. Mr. Bond regularly visits his wife at the Federal Detention Center and speaks with her via telephone. He also continues to live with the defendant's younger brother Alex. There is no further discussion of divorce. Mr. Bond tearfully stated that he just wants his wife home again.

64. Mr. Bond related that he still enjoys an intact relationship with the defendant's mother and sister. The probation officer interviewed the defendant's sister, Sonya, at her home in Trooper, Pennsylvania, on January 30, 2008. Sonya provided further confirmation of the defendant's background. She also described how greatly distressed she became following her sister's imprisonment in the instant offense. Sonya said that she was so shocked by the arrest that it

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[7] Ms. Haynes statements regarding her relationship with Clifford Bond did not coincide with his statements regarding their relationship or any relationship Mr. Bond could have regarding their child. It should suffice to say that any contact between Ms. Haynes and Mr. Bond regarding the child is conducted through legal representation.

caused her to suffer a stress-induced heart attack. The instant offense greatly effected Sonya as well. She, too, regarded Mylinda Haynes as a sister. Sonya ended her relationship with Ms. Haynes subsequent to the defendant's arrest. She felt as if she lost two sisters in the past year with all that has transpired.

65. Sonya could not help but emphasize how out-of-character the instant offense was for the defendant to have committed. She could only speculate that her sister was suffering so much within herself in order to have carried out such these acts against Ms. Haynes. Sonya said she, unlike the defendant, is the more emotional one between them. Sonya felt that the defendant should have gotten counseling earlier. However, she always knew the defendant to be the strong one, the one who kept it all together, and the one who always thought of others before herself. Sonya only wants the defendant to find healing and happiness. She is content to let the outcome in God's hands while praying that the defendant will receive mercy.

66. The probation officer also interviewed the defendant's mother, Sandra Atwell, in person at the Phoenixville Hospital where she is employed. Ms. Atwell provided confirmation of the defendant's background and made observations about her daughter's personality. She described the defendant as a shy, introverted individual who is a great listener and humanitarian. Ms. Atwell knew her daughter to be one who instantly cared for someone, even if she didn't really know them. She knew the defendant was

committed to furthering her education, her career, and rebuilding trust in her marriage to Clifford Bond.

67. Ms. Atwell conveyed her shock and disbelief about the defendant's arrest. It is noted that she was unfamiliar with the details of the instant offense, and she does not know what actions the defendant took against Myrlinda Haynes, a woman whom the defendant's mother considered to be her third daughter. Despite all that has transpired, the defendant's mother holds no ill feelings towards Myrlinda or her daughter. She prayerfully hopes all can forgive one another. Overall, the defendant's mother recapitulate many of the same feelings that Sonya Forde conveyed regarding the defendant. She felt responsible for failing to see through the masquerade maintained by the defendant regarding the pain she experienced over the affair between the defendant's husband and Ms. Haynes. The defendant's mother desperately wishes to see the defendant home with them again.

Physical Condition

68. The defendant is healthy and has no history of health problems but for asthma, a heart murmur, and alopecia. It is believed that she developed a form of alopecia, or hair loss, from the stress induced from knowledge of Ms. Haynes pregnancy. The defendant was taking medication for asthma prior to her arrest and detention in the instant offense. The defendant's family noted that her onset of asthma occurred after she

learned of the affair between her husband and Ms. Haynes. It is noted that the defendant received treatment for her asthma from Dr. Klinger at the Lansdale Medical Group. The defendant's heart murmur is not problematic. A letter sent to Lansdale Medical Group at 801 South Broad Street, Lansdale, Pennsylvania, was returned to sender, attempted not known, unable to forward. The defendant's husband confirmed that the defendant was treated for asthma at the Lansdale Medical Group.

69. The defendant stands five feet tall and weighs approximately 100 pounds. She has brown eyes and black hair. The defendant reported having a tattoo of a butterfly on the back of her left shoulder. She did not report having any other identifying marks upon her person.

Mental and Emotional Health

70. The defendant reported no history of mental or emotional problems and no history of treatment for such problems. It is noted that the defendant's husband informed that the defendant seemed depressed after learning of his affair with Ms. Haynes. The defendant's attorney informed that the defendant will be undergoing a mental health evaluation prior to sentencing. A copy of the mental health evaluation completed by Steven E. Samuel, Ph.D. was forwarded to the probation officer as of May 16, 2008. A copy is also expected to be forwarded to the Court. In brief, Dr. Samuel concluded, "it is my opinion, stated within a reasonable degree of psychological certainty, that Ms. Bond committed the crimes which resulted in

her arrest while suffering from a significantly reduced mental capacity." Dr. Samuel believes that the defendant "knew what she was doing was wrong but that she was unable to control behavior she knew was wrongful" due to "the intense level of anxiety and depression in her which was in response to learning her husband and 'sister' (e.g. Myrlinda Haynes) having betrayed her." Dr. Samuel also concluded that the instant offense was out-of-character for the defendant, and she is not likely to recidivate.

Substance Abuse

71. The defendant reported no history of alcohol or drug use and no history of treatment for substance abuse.

Education and Vocational Skills

72. The defendant completed high school in Barbados. However, she stated that she earned her GED in Pennsylvania after immigrating to the United States in 1995. The probation officer is awaiting confirmation from the Department of Education for the Commonwealth of Pennsylvania.

73. The defendant also began attending the Community College of Philadelphia in 1995. She advised that she took classes between 1995 and 1997 but did not obtain any degree. The Community College of Philadelphia confirmed the defendant's attendance between the summer of 1995 and the summer of 1997. The Community College of Philadelphia also noted that she attained an associates degree in general studies.

74. The defendant next attended Thomas Jefferson University Hospital to study medical technology. She completed the course work over two years and earned her bachelor of science degree in 1999. The defendant later returned to Thomas Jefferson University Hospital to study microbiology. Thomas Jefferson University confirmed that the defendant attended their facility between the spring of 2002 and June 4, 2004, and graduated from the Jefferson College of Graduate Studies with a masters of science in microbiology. The probation officer is awaiting a response from another office within Thomas Jefferson University Hospital regarding the defendant's bachelors degree.

75. The defendant continued in her pursuit of a higher education by completing her MBA degree through an online or internet-based program with Bake College, located in Flint, Michigan. Baker College confirmed that the defendant completed course work between April 2005 and August 2006 and graduated with a masters of business administration.

76. The defendant does not have any other specialized training beyond her reported education. She holds no professional licenses and has no military service history.

Employment Record

77. As noted in the Offense Conduct section, the defendant was employed as a level 5 technical assistant in the CIS / Biocides organization for Rohm and Haas at its Spring House Technical Center between December 11, 2000, and

November 2, 2006. The defendant left this position for new job with Cholestech working out of her work in Lansdale, Pennsylvania. Cholestech confirmed their employment of the defendant as a technical consultant between November 3, 2006, and June 19, 2007. She received an annual salary of $58,741.54. A Detailed FICA Earnings and Employment statement from the Social Security Administration (SSA records) also confirm the defendant's work history with Rohn and Haas and Cholestech.

78. The defendant prior work history included part time employment as a medical technician with Mercy-Suburban Hospital, located in Conshohocken, Pennsylvania, between 2001 and 2006, full time employment as a medical technical with Thomas Jefferson University Hospital between 1998 and 2000, and one year employment as an accounts payable clerk with EMSL Analytical, Inc., located in Westmont, New Jersey. EMSL was unable to confirm the defendant's prior employment with their company in or about 1997. However, SSA records show earnings from employment with EMSL in the amounts of $3,120.00 in 1997 and $1,714.00 in 1998. SSA records also confirms her employment with Mercy-Suburban Hospital and Thomas Jefferson University Hospital.

Financial Condition: Ability to Pay

79. The defendant was unable to provide detailed information regarding her finances due to her state of imprisonment. However, she did provide

as much information as possible. The defendant declared having two individually held personal accounts with Commerce Bank and one jointly held account with her husband at Wachovia Bank. She could not provide current balances. The defendant's husband informed that the Commerce Bank accounts were emptied. The Wachovia Bank account is used to pay bills, and it oftentimes has a balance below $100.00.

80. The defendant next declared having a variable annuity and an IRA with PrimeAmerica, valued at approximately $50,000 and $20,000 respectively. The defendant's husband later advised that the IRA with MetLife is valued at approximately $46,000. She also noted that her husband has two retirements accounts, an IRA with PrimeAmerica and a 401K. She did not know the values of these accounts. The defendant's husband confirmed the value of the defendant's IRA and PrimeAmerica account. He also informed that his 401K account is valued at approximately $80,000 and his PrimeAmerica account has about the same value as the defendant's account. The defendant further declared having two other investment accounts, one of which is valued at approximately $7,000. She did not know the value of the other investment account. The defendant's husband noted that other investments were liquidated in order to pay legal fees.

81. The defendant holds one term life insurance policy with a face value of $400,000. The policy has no cash surrender value. She is also the owner of a 2007 Saturn Ion, valued at $14,000.

The defendant also noted that she obtained a loan to purchase this vehicle. The loan balance is approximately $12,000. The defendant's credit report shows one auto loan with Chase with a balance of $12,172. The defendant's husband informed that he attempting to sell this vehicle. The defendant's husband currently leases a 2007 Honda Accord. The lease will expire in eleven months.

82. The defendant jointly owns the property at 1963 Ryans Run, Lansdale, Pennsylvania. She purchased the home with her husband in February 2001 for $154,000. The fair market value of the home was approximated by the defendant to be worth at least $275,000 today. The defendant's husband later informed that the home was recently accessed in 2007 and given a fair market value of $279,000. The home had been listed for sale, but the defendant and her husband later decided to take the home off-the-market.

83. The balance of the first mortgage was reported as being $139,000. The defendant's credit report showed a Freddie Mac account real estate mortgage account through CitiMortgage with a current balance of $141,405. The defendant said she and her husband recently took a second mortgage on the property. However, she did not know the balance of this mortgage. The defendant's credit report did not show any reason mortgage or personal loan. The defendant's husband explained that a second mortgage for $30,000 was obtained. However, it is was later replaced by an $80,000 home equity line-of-credit

from Wachovia. The money paid for legal fees and was used to pay necessary monthly expenses.

84. The defendant informed that she and her husband also jointly own two time shares. One of the time shares was purchased for $14,000 at Shawnee-on-the-Delaware, located in the Poconos Region of Pennsylvania. The other time share was purchased for $12,000 at the shell Vacation Club in Arizona. The fair market values of the time shares is believed to be no different than the reported purchase prices. The defendant's husband confirmed the time shares and noted that he is attempting to sell them.

85. The defendant's other assets include $20,000 in jewelry, $10,000 in household belongings, and $7,000 in art. All of these assets are jointly owned by the defendant and her husband. A search of public records and the interview with the defendant's husband did not reveal any other assets. It is noted that the defendant's husband does have a pending lawsuit. He retained counsel after suffering significant bodily injury in a vehicular accident approximately two years ago. An out-of-court settlement in the amount of $85,000 was recently offered to the defendant by Mr. Bond's attorney, Patrick McDonnell, Esquire.

86. The defendant reported having approximately $50,000 in credit card debt and $50,000 in student loans besides her two mortgages and auto loan. The defendant's credit report shows six charge accounts with balances and eight unsatisfied student loans. The sum of the balances for the six charge account is $51,539,

and the sum of the balances for the eight student loans is $35,082. The defendant's husband has some additional debt from credit cards. However, he believed that most was jointly shared with the defendant. The defendant's husband is currently exploring options to consolidate his debt by refinancing his mortgage or other means. He is also trying to have the student loan payments deferred.

87. The defendant's assets, as reported and/or confirmed through public records, conservatively totals $529,000. Likewise, the defendant's liabilities, as reported and/or confirmed through public records, is approximately $250,000. Therefore, the defendant's total net worth is approximately $279,000.

88. The defendant estimates that her husband earns $6,600 in gross pay each month through his employment with Rohm and Haas. He no longer has the benefit of the defendant's additional income to satisfy their necessary monthly expenses. The primary mortgage, which includes an escrow account, must be in monthly installments of $1,493. The amount of the home equity monthly installment payment is unknown. The monthly utilities, including electric, gas, water/sewer, telephone, basic cable, and internet, is approximately $337.00. The monthly payments towards insurances, including life and auto, is $115, and the minimum installments for the credit cards is at least $500. The necessary monthly expenses total at least $2,445.00.

89. The defendant could not attest to the amounts paid each month for groceries, transportation, and clothing by her husband. She also did not known the amount of child support he is required to pay. An inquiry with Pennsylvania's Child Support website confirms the existence of the court-ordered support in Montgomery County, Pennsylvania. The total arrears is $1,062.18. However, the requirement monthly installment was not shown. The defendant's husband currently pays child support in monthly installments of $1,500. Ten percent of this amount current goes towards arrears. The defendant's husband estimated that half of his net income goes to child support. He has approximately $1,800 in net monthly income, as well as $400 from his adopted son, for a total of $2,200 to satisfy his necessary monthly expenses.

90. Pursuant to U.S.S.G. § 5E1.2(a), the court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine. The defendant has some assets but no current income due to state of imprisonment. Based upon the defendant's current fiscal status and strong employment history, a minimal fine is a viable option. However, the court shall order that any money paid by the defendant shall first be applied to satisfy the order of restitution. [U.S.S.G. § 5E1.1(c)]. Restitution may be an issue in this case. The victim has submitted an affidavit with the probation officer in which she reports having more than $17,000 in expenses as a result of the instant offense. The Court may

consider the imposition of restitution as part of the sentence.

91. If the defendant is incarcerated, payment on a fine or restitution can commence through the Bureau of Prisons Inmate Financial Responsibility Program. An inmate participating in this program will be able to contribute half of monthly prison work earnings, for every month of imprisonment served, toward any immediately due fine or restitution.

PART D. SENTENCING OPTIONS

Custody

92. **Statutory Provisions:** The maximum term of imprisonment for Counts One and Two is life, pursuant to 18 U.S.C. § 229(a). The maximum term of imprisonment for Counts Three and Four is five years, pursuant to 18 U.S.C. § 1708.

93. **Guideline Provisions:** Pursuant to U.S.S.G. Chapter 5, Part A, based on a total offense level of 27 and a criminal history category of 1, **the guideline range for imprisonment is 70 to 87 months**.

Impact of the Plea Agreement

94. The plea agreement did not contain any stipulations to the determination of the offense level but for the three-level reduction to the offense level for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1(a) and (b).

Supervised Release

95. **Statutory Provisions:** For Courts One and Two, if a term of imprisonment is imposed, the Court

may impose a term of supervised release of not more than five years. 18 U.S.C. § 3583(b)(1). For Counts Three and Four, if a term of imprisonment is imposed, the Court may impose a term of supervised release of not more than three years. 18 U.S.C. § 3583(b)(2). The defendant must submit to one drug test within 15 days after commencing supervised release and at least two periodic tests thereafter, unless the Court determines, based on reliable information, that there is low risk of future substance abuse, pursuant to 18 U.S.C. § 3583(d).

96. **Guideline Provisions:** For Counts One and Two, the guideline range for a term of supervised release is three to five years, pursuant to U.S.S.G. § 5D1.2(a). For Counts Three and Four, the guideline range for a term of supervised release is two to three years, pursuant to U.S.S.G. § 5D1.2(a). If a sentence of imprisonment of one year or less is imposed, a term of supervised release is not required but is optional, pursuant to U.S.S.G. § 5D1.1(b). Supervised release is required if the Court imposes a term of imprisonment of more than one year, unless a departure is granted in accordance with the Application Notes of U.S.S.G. §§ 5D1.1 and 5D1.2.

Probation

97. **Statutory Provisions:** The defendant is not eligible for probation because Counts One and Two in the instant offense are Class A felonies. 18 U.S.C. § 3561(a)(1).

98. **Guideline Provisions:** The defendant is not eligible for probation because Counts One and Two in the instant offense are Class A felonies. U.S.S.G. § 5B1.1(b)(1).

Possible Special Conditions

99. Due to the defendant's history and/or nature of the instant offense(s), the following special conditions of community supervision, not specifically authorized by statute, should be considered at sentencing: financial disclosure, financial restrictions, and no contact, directly or indirectly, with the victim(s) of the instant offense.

Occupational Restrictions

100. **Statutory Provisions**: Pursuant to 18 U.S.C. §§ 3563(b)(6) and 3583(d), the Court has the discretion to impose a condition of probation or supervised release requiring that the defendant refrain from engaging in a specific occupation, business, or profession bearing a reasonably direct relationship to the conduct constituting the offense, or engage in such a specified occupation, business or profession only to a stated degree or under stated circumstances.

101. **Guideline Provisions**: Pursuant to U.S.S.G. § 5F1.5(a), the Court may impose a condition of probation or supervised release prohibiting the defendant from engaging in a specific occupation, business or profession or limiting the terms on which the defendant may do so, only if it determined that (1) a reasonably direct relationship existed between the defendant's

occupation, business or profession and the conduct relevant to the offense of conviction; and (2) imposition of such a restriction is reasonably necessary to protect the public because there is reason to believe that, absent such restriction, the defendant will continue to engage in unlawful conduct similar to that for which the defendant was convicted. U.S.S.G. § 5F1.5(b) specifies that if the Court decides to impose such a condition, it shall be for the minimum time and to the minimum extent necessary to protect the public.

DNA Collection

102. Titles 18 U.S.C. § 3563(a) and 18 U.S.C. § 3583(d) require persons convicted of federal felonies to cooperate in the collection of a DNA sample. The defendant's current offense or a prior federal conviction is a felony.

Fines

103. **Statutory Provisions**: The maximum fine for each of Counts One, Two, Three and Four is $250,000 or twice the loss or gain caused by the offense, whichever is greater, pursuant to 18 U.S.C. § 3571. The Criminal Fine Improvement Act of 1987 is applicable. Any fine exceeding $2,500, not satisfied within 15 days, will be charged interest at a rate determined by the U.S. Treasury auctions. If a defendant is unable to pay interest, the Court may waive the interest, limit the total interest to a specific dollar amount, or limit the time of interest accrual. See 18 U.S.C. § 3612(f). The liability to pay a fine terminates the later of 20 years from the entry of judgment or 20 years after the release from imprisonment.

See 18 U.S.C. § 3613(b). Fine payments, as well as the special assessment, should be made payable to Clerk, U.S. District Court. A special assessment of $100 per count, for a total special assessment of $400, is mandatory and due at sentencing, pursuant to 18 U.S.C. § 3013.

104. **Guidelines Provisions**: The fine range for the instant offense is from $12,500 to $125,000, pursuant to U.S.S.G. § 5E1.2(c)(3). The court shall impose a fine in all cases except where the defendant established that he is unable to pay and is not likely to become able to pay any fine, pursuant to U.S.S.G. § 5E1.2(a).

Restitution

105. Restitution is not an issue in this case.

PART E. FACTORS THAT MAY WARRANT DEPARTURE

106. The probation officer has no information concerning the offense or the offender which would warrant a departure from the advisory sentencing guidelines. It is noted that the defense will present testimony of a forensic psychologist who will testify as to the defendant's diminished capacity at the time of the commission of the offense. The defense believes a downward departure, pursuant to U.S.S.G. § 5K2.13. The Court may consider this departure option.

PART F. FACTORS THAT MAY WARRANT A SENTENCE OUTSIDE OF THE GUIDELINES SYSTEM

107. The probation officer has not identified possible grounds for a sentence outside of the advisory

guidelines system. The defense asserts that this case is outside the heartland of case for which the application of U.S.S.G. § 2M6.1 is warranted. The defense is also presenting psychological evidence to show that the instant offense was out of character for the defendant and that she had committed it while "suffering from a significantly reduced mental capacity." The Court may consider these as factors supporting a variance.

Respectfully submitted,

DANIEL W. BLAHUSCH
Chief U.S. Probation Officer

By: /s/ Alexander T. Posey
Alexander T. Posey
Senior U.S. Probation Officer

Approved:

/s/ 5/23/08
Sandra Luehrs-Shaw Date
Supervising U.S. Probation Officer

ADDENDUM
TO THE PRESENTENCE REPORT

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES v. CAROL ANNE BOND,
DOCKET NO. 07-00528-01

Subsequent to the disclosure of the draft presentence report, the Probation office received additional information, now included in Paragraph(s) 3, 23, 24, 25, 29, 32, 60 (footnote only), 62 (footnote only), 68, 70, 90, 99, 106, and 107, which does not impact the guideline applications as stated in the draft presentence report. The Probation office made other changes to the draft presentence report, now included in Paragraph(s) 37, 38, 39, 42, 45, 47, 93, and 104, which altered the original guideline calculations.

OBJECTIONS

By the Government

The government did not file any formal objections to the draft presentence report. However, the government contends that the two-level upward adjustment, pursuant to U.S.S.G. § 3A1.1, for vulnerable victim is applicable since Myrlinda Haynes' child may have been targeted based on the fact that the back doors of Haynes' vehicle were consistently and repeated laced with toxic chemicals.

Response:

The Probation office declined to apply the enhancement for the reasons articulated in the draft presentence report. Harm could have come to the

child but did not through the events of the instant offense. The Probation office has decided to maintain its position and give the defendant the benefit of the doubt. It is a factor that the Court may wish to consider in its sentence in the event that the Court comes to the same conclusion. The Court will need to resolve this matter, pursuant to U.S.S.G. § 6A1.3, at the time of sentencing.

By the Defendant

Objection No. 1:

The defense objects to the two-level upward adjustment, pursuant to U.S.S.G. § 3B1.3, presented in Paragraph 40. The defense contends that the defendant's position at Rohm and Haas does not merit upward adjustment as she did not exercise discretionary or supervisory authority and her position did not grant her greater access to chemicals to other employees whose job titles were equal to, lower, or greater than her own. The defense also compares the defendant's position to that of a bank teller and presents case law, including the Third Circuit's three-prong test from *United States v. Pardo*, 25 F.3d 1187, 1191 (3d Cir. 1994). For these reasons, the defense believes Paragraph 40 should be deleted.

Response:

The Probation office refined its position in Paragraph 40 based upon the objection by the defense. The Probation office believes the two-level upward adjustment is applicable, based upon the three-prong test found in *United States v. Pardo*, 25 F.3d 1187, 1191 (3d Cir. 1994). Furthermore, the

defendant, a trained microbiologist through academic and on-the-job training, possessed a special skill beyond that of the average individual which enabled her to safely obtain, transport, and use the toxic chemicals (i.e., the chemical weapon) in the commission of the instant offense without bringing harm to herself or others beyond the intended target victim. Even if the defendant obtained the chemicals outside of Rohm and Haas, she still possessed the special skill and training to know what effect certain toxic chemicals would have upon a human being. The defendant may not know wanted to bring about Ms. Haynes' or her child's death. However, she committed the instant offense, essentially an aggravated assault using a chemical weapon, to bring harm to Ms. Haynes. Therefore, the defendant would have chosen the toxic chemicals she did based upon learned knowledge of the effect that they would have upon the victim. As noted in the presentence report, the victim felt a burning sensation after touching the one toxic chemical placed on her vehicle's door handle by the victim.

The Probation office believes the defendant's position at Rohm and Haas and/or her special skill in microbiology and knowledge of chemicals significantly contributed to the commission of the instant offense. Pursuant to U.S.S.G. § 6A1.3, the Court will need to resolve this matter at the time of sentencing.

Respectfully submitted,

DANIEL W. BLAHUSCH
Chief U.S. Probation Officer

By: /s/ Alexander T. Posey
Alexander T. Posey
Senior U.S. Probation Officer

Approved:

/s/
Sandra Luehrs-Shaw
Supervising U.S. Probation Officer

5/23/08
Date

Appendix F

U.S. Const. art. I, § 8, cl. 18
Necessary & Proper Clause

The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. II, § 2, cl. 2
Treaty Clause

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

18 U.S.C. § 229
Prohibited Activities

(a) UNLAWFUL CONDUCT.—Except as provided in subsection (b), it shall be unlawful for any person knowingly—

(1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or

(2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1).

(b) EXEMPTED AGENCIES AND PERSONS.—

(1) IN GENERAL.—Subsection (a) does not apply to the retention, ownership, possession, transfer, or receipt of a chemical weapon by a department, agency, or other entity of the United States, or by a person described in paragraph (2), pending destruction of the weapon.

(2) EXEMPTED PERSONS.—A person referred to in paragraph (1) is—

(A) any person, including a member of the Armed Forces of the United States, who is authorized by law or by an appropriate officer of the United States to retain, own, possess, transfer, or receive the chemical weapon; or

(B) in an emergency situation, any otherwise nonculpable person if the person is attempting to destroy or seize the weapon.

(c) JURISDICTION.—Conduct prohibited by subsection (a) is within the jurisdiction of the United States if the prohibited conduct—

(1) takes place in the United States;

(2) takes place outside of the United States and is committed by a national of the United States;

(3) is committed against a national of the United States while the national is outside the United States; or

(4) is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States.

18 U.S.C. § 229A
Penalties

(a) CRIMINAL PENALTIES.—

(1) IN GENERAL.—Any person who violates section 229 of this title shall be fined under this title, or imprisoned for any term of years, or both.

(2) DEATH PENALTY.—Any person who violates section 229 of this title and by whose action the death of another person is the result shall be punished by death or imprisoned for life.

(b) CIVIL PENALTIES.—

(1) IN GENERAL.—The Attorney General may bring a civil action in the appropriate United States district court against any person who violates section 229 of this title and, upon proof of such violation by a preponderance of the evidence, such person shall be subject to pay a civil penalty in an amount not to exceed $100,000 for each such violation.

(2) RELATION TO OTHER PROCEEDINGS.—The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

(c) REIMBURSEMENT OF COSTS.—The court shall order any person convicted of an offense under subsection (a) to reimburse the United States for any expenses incurred by the United States incident to the seizure, storage, handling, transportation, and

destruction or other disposition of any property that was seized in connection with an investigation of the commission of the offense by that person. A person ordered to reimburse the United States for expenses under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered under this subsection to reimburse the United States for the same expenses.

18 U.S.C. § 229F
Definitions

In this chapter:

(1) CHEMICAL WEAPON.—The term "chemical weapon" means the following, together or separately:

(A) A toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.

(B) A munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in subparagraph (A), which would be released as a result of the employment of such munition or device.

(C) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in subparagraph (B).

(2) CHEMICAL WEAPONS CONVENTION; CONVENTION.—The terms "Chemical Weapons Convention" and "Convention" mean the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993.

(3) KEY COMPONENT OF A BINARY OR MULTICOMPONENT CHEMICAL SYSTEM.—The term "key component of a binary or multicomponent chemical system" means the precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly

with other chemicals in the binary or multicomponent system.

(4) NATIONAL OF THE UNITED STATES.—The term "national of the United States" has the same meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(5) PERSON.—The term "person", except as otherwise provided, means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

(6) PRECURSOR.—

(A) IN GENERAL.—The term "precursor" means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. The term includes any key component of a binary or multicomponent chemical system.

(B) LIST OF PRECURSORS.—Precursors which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

(7) PURPOSES NOT PROHIBITED BY THIS CHAPTER.—The term "purposes not prohibited by this chapter" means the following:

(A) PEACEFUL PURPOSES.—Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.

(B) PROTECTIVE PURPOSES.—Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.

(C) UNRELATED MILITARY PURPOSES.—Any military purpose of the United States that is not connected with the use of a chemical weapon or that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm.

(D) LAW ENFORCEMENT PURPOSES.—Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

(8) TOXIC CHEMICAL.—

(A) IN GENERAL.—The term "toxic chemical" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(B) LIST OF TOXIC CHEMICALS.—Toxic chemicals which have been identified for the application of verification measures under Article VI of the Convention are listed in

schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

(9) UNITED STATES.—The term "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States and includes all places under the jurisdiction or control of the United States, including—

(A) any of the places within the provisions of paragraph (41) of section 40102 of title 49, United States Code;

(B) any civil aircraft of the United States or public aircraft, as such terms are defined in paragraphs (17) and (37), respectively, of section 40102 of title 49, United States Code; and

(C) any vessel of the United States, as such term is defined in section 70502(b) of title 46, United States Code.

Excerpts from the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction

PREAMBLE

The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction,

Desiring to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 (the Geneva Protocol of 1925),

Recognizing that this Convention reaffirms principles and objectives of and obligations assumed under the Geneva Protocol of 1925, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction signed at London, Moscow and Washington on 10 April 1972,

Bearing in mind the objective contained in Article IX of the Convention on the Prohibition of the

Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,

Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925,

Recognizing the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare,

Considering that achievements in the field of chemistry should be used exclusively for the benefit of mankind,

Desiring to promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under this Convention in order to enhance the economic and technological development of all States Parties,

Convinced that the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives,

Have agreed as follows:

ARTICLE I

General Obligations

1. Each State Party to this Convention undertakes never under any circumstances:

   (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;

   (b) To use chemical weapons;

   (c) To engage in any military preparations to use chemical weapons;

   (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.

4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

5. Each State Party undertakes not to use riot control agents as a method of warfare.

ARTICLE II

Definitions and Criteria

For the purposes of this Convention:

1. "Chemical Weapons" means the following, together or separately:

   (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;

   (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;

   (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

2. "Toxic Chemical" means:

Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(For the purpose of implementing this Convention, toxic chemicals which have been identified for the

application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

3. "Precursor" means:

Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

(For the purpose of implementing this Convention, precursors which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

4. "Key Component of Binary or Multicomponent Chemical Systems" (hereinafter referred to as "key component") means:

The precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

5. "Old Chemical Weapons" means:

   (a) Chemical weapons which were produced before 1925; or

   (b) Chemical weapons produced in the period between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons.

6. "Abandoned Chemical Weapons" means:

Chemical weapons, including old chemical weapons, abandoned by a State after 1 January 1925 on the territory of another State without the consent of the latter.

7. "Riot Control Agent" means:

Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

8. "Chemical Weapons Production Facility":

(a) Means any equipment, as well as any building housing such equipment, that was designed, constructed or used at any time since 1 January 1946:

(i) As part of the stage in the production of chemicals ("final technological stage") where the material flows would contain, when the equipment is in operation:

(1) Any chemical listed in Schedule 1 in the Annex on Chemicals; or

(2) Any other chemical that has no use, above 1 tonne per year on the territory of a State Party or in any other place under the jurisdiction or control of a State Party, for purposes not prohibited under this Convention, but can be used for chemical weapons purposes;

or

(ii) For filling chemical weapons, including, *inter alia*, the filling of chemicals listed in Schedule 1 into munitions, devices or bulk storage containers; the filling of chemicals into containers that form part of assembled binary munitions and

devices or into chemical submunitions that form part of assembled unitary munitions and devices, and the loading of the containers and chemical submunitions into the respective munitions and devices;

(b) Does not mean:

(i) Any facility having a production capacity for synthesis of chemicals specified in subparagraph (a) (i) that is less than 1 tonne;

(ii) Any facility in which a chemical specified in subparagraph (a) (i) is or was produced as an unavoidable by-product of activities for purposes not prohibited under this Convention, provided that the chemical does not exceed 3 per cent of the total product and that the facility is subject to declaration and inspection under the Annex on Implementation and Verification (hereinafter referred to as "Verification Annex"); or

(iii) The single small-scale facility for production of chemicals listed in Schedule 1 for purposes not prohibited under this Convention as referred to in Part VI of the Verification Annex.

9. "Purposes Not Prohibited Under this Convention" means:

(a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

(c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;

(d) Law enforcement including domestic riot control purposes.

10. "Production Capacity" means:

The annual quantitative potential for manufacturing a specific chemical based on the technological process actually used or, if the process is not yet operational, planned to be used at the relevant facility. It shall be deemed to be equal to the nameplate capacity or, if the nameplate capacity is not available, to the design capacity. The nameplate capacity is the product output under conditions optimized for maximum quantity for the production facility, as demonstrated by one or more test-runs. The design capacity is the corresponding theoretically calculated product output.

11. "Organization" means the Organization for the Prohibition of Chemical Weapons established pursuant to Article VIII of this Convention.

12. For the purposes of Article VI:

(a) "Production" of a chemical means its formation through chemical reaction;

(b) "Processing" of a chemical means a physical process, such as formulation, extraction and

purification, in which a chemical is not converted into another chemical;

(c) "Consumption" of a chemical means its conversion into another chemical via a chemical reaction.

* * *

ARTICLE IV

Chemical Weapons

1. The provisions of this Article and the detailed procedures for its implementation shall apply to all chemical weapons owned or possessed by a State Party, or that are located in any place under its jurisdiction or control, except old chemical weapons and abandoned chemical weapons to which Part IV (B) of the Verification Annex applies.

2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.

3. All locations at which chemical weapons specified in paragraph 1 are stored or destroyed shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments, in accordance with Part IV (A) of the Verification Annex.

4. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (a), has been submitted, provide access to chemical weapons specified in paragraph 1 for the purpose of systematic verification of the declaration through on-site inspection. Thereafter, each State Party shall not remove any of these chemical weapons, except to a chemical weapons destruction facility. It shall provide access to such chemical weapons, for the purpose of systematic on-site verification.

5. Each State Party shall provide access to any chemical weapons destruction facilities and

their storage areas, that it owns or possesses, or that are located in any place under its jurisdiction or control, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments.

6. Each State Party shall destroy all chemical weapons specified in paragraph 1 pursuant to the Verification Annex and in accordance with the agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than two years after this Convention enters into force for it and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such chemical weapons at a faster rate.

7. Each State Party shall:

   (a) Submit detailed plans for the destruction of chemical weapons specified in paragraph 1 not later than 60 days before each annual destruction period begins, in accordance with Part IV (A), paragraph 29, of the Verification Annex; the detailed plans shall encompass all stocks to be destroyed during the next annual destruction period;

   (b) Submit declarations annually regarding the implementation of its plans for destruction of chemical weapons specified in paragraph 1, not later than 60 days after the end of each annual destruction period; and

(c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons specified in paragraph 1 have been destroyed.

8. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 6, it shall destroy chemical weapons specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.

9. Any chemical weapons discovered by a State Party after the initial declaration of chemical weapons shall be reported, secured and destroyed in accordance with Part IV (A) of the Verification Annex.

10. Each State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall transport, sample, store and destroy chemical weapons in accordance with its national standards for safety and emissions.

11. Any State Party which has on its territory chemical weapons that are owned or possessed by another State, or that are located in any place under the jurisdiction or control of another State, shall make the fullest efforts to ensure that these chemical weapons are removed from its territory not later than one year after this Convention enters into force for it. If they are

not removed within one year, the State Party may request the Organization and other States Parties to provide assistance in the destruction of these chemical weapons.

12. Each State Party undertakes to cooperate with other States Parties that request information or assistance on a bilateral basis or through the Technical Secretariat regarding methods and technologies for the safe and efficient destruction of chemical weapons.

13. In carrying out verification activities pursuant to this Article and Part IV (A) of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical weapons storage and their destruction among States Parties.

To this end, the Executive Council shall decide to limit verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

(a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part IV (A) of the Verification Annex;

(b) Implementation of such an agreement provides for sufficient assurance of compliance with the relevant provisions of this Convention; and

(c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.

14. If the Executive Council takes a decision pursuant to paragraph 13, the Organization shall have the right to monitor the implementation of the bilateral or multilateral agreement.

15. Nothing in paragraphs 13 and 14 shall affect the obligation of a State Party to provide declarations pursuant to Article III, this Article and Part IV (A) of the Verification Annex.

16. Each State Party shall meet the costs of destruction of chemical weapons it is obliged to destroy. It shall also meet the costs of verification of storage and destruction of these chemical weapons unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 13, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

17. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

* * *

ARTICLE VII

National Implementation Measures

General undertakings

1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

   (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

   (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

   (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.

3. Each State Party, during the implementation of its obligations under this Convention, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and

shall cooperate as appropriate with other States Parties in this regard.

Relations between the State Party and the Organization

4. In order to fulfil its obligations under this Convention, each State Party shall designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization and other States Parties. Each State Party shall notify the Organization of its National Authority at the time that this Convention enters into force for it.

5. Each State Party shall inform the Organization of the legislative and administrative measures taken to implement this Convention.

6. Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Convention. It shall treat such information and data exclusively in connection with its rights and obligations under this Convention and in accordance with the provisions set forth in the Confidentiality Annex.

7. Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical Secretariat.

* * *

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
OCT 4 - 2012
OFFICE OF THE CLERK

No. 12-158

In the Supreme Court of the United States

CAROL ANNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

The Chemical Weapons Convention Implementation Act of 1998 (the Act), Pub. L. No. 105-277, 112 Stat. 2681-856, makes it unlawful for a person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1). It defines "chemical weapon" as a "toxic chemical" that can "cause death, temporary incapacitation or permanent harm," "except where intended" for, among other things, a "peaceful purpose," 18 U.S.C. 229F(1)(A), (7)(A), and (8)(A). The questions presented are:

1. Whether the use of a toxic chemical to harm another individual is use for a "peaceful purpose" and thus exempt from the Act's prohibition.

2. Whether Congress had the power under the Constitution to enact the Act.

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Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), 1974 U.N.T.S. 45 ..... *passim*
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18 U.S.C. 229F(7) 3, 15
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18 U.S.C. 842(n)(1) 14
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Miscellaneous:

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Samuel B. Crandall, *Treaties: Their Making and Enforcement* (2d ed. 1916) 21

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In the Supreme Court of the United States

No. 12-158

CAROL ANNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-47) is reported at 681 F.3d 149. The order of the district court (Pet. App. 84-85) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 3, 2012. The petition for a writ of certiorari was filed on August 1, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and theft of mail, in violation of 18 U.S.C. 1708. She was sentenced to six years of imprisonment, to be followed by five years of supervised re-

lease. Pet. App. 51-52. The court of appeals affirmed. *Id.* at 48-72. This Court reversed and remanded. 131 S. Ct. 2355 (2011). On remand, the court of appeals again affirmed. Pet. App. 1-47.

1. In 1993, the Senate approved and the United States ratified an international treaty that prohibits the development, possession, and use of chemical weapons by nations, and requires nations to adopt measures prohibiting such activities domestically by private companies and individuals. See Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Convention), *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), 1974 U.N.T.S. 45; 143 Cong. Rec. 5812 (1997). State Parties to the Convention, including the United States, are legally obligated never to "use chemical weapons" or to "develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone." Pet. App. 148.

Each State Party is required to "adopt the necessary measures to implement its obligations under this Convention." Pet. App. 160. In particular, each State Party is required to enact domestic legislation, "including * * * penal legislation," that prohibits "natural and legal persons anywhere on its territory * * * from undertaking any activity prohibited to a State Party" under the Convention. *Ibid.* The Convention also requires parties to "adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention." Convention Art. VI, ¶ 2.

To implement the United States' obligations under the Convention, Congress enacted the Chemical Weapons Convention Implementation Act of 1998 (the Act), Pub. L. No. 105-277, 112 Stat. 2681-856 (enacting 22 U.S.C. 6701 *et seq.*); see *id.* § 201(a), 112 Stat. 2681-866 (enacting 18 U.S.C. 229 *et seq.*). The criminal provisions of the Act, which mirror the prohibitions in the Convention, make it unlawful for a person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1); see Pet. App. 138.

A "chemical weapon" is defined to include a "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter." 18 U.S.C. 229F(1)(A). "Purposes not prohibited by this chapter" is a defined term that means "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity," or other purposes such as law enforcement or military purposes not relevant here, "as long as the type and quantity is consistent with such a purpose." 18 U.S.C. 229F(1)(A) and (7). A "toxic chemical" is a "chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." 18 U.S.C. 229F(8)(A). See Pet. App. 149, 152-153 (same definitions for Convention).

2. In 2006, petitioner discovered that a close friend, Myrlinda Haynes, had become pregnant as the result of an affair with petitioner's husband. Pet. App. 3; C.A. App. 7. Petitioner vowed revenge and promised that she would make Haynes's life "a living hell." Pet. App. 91.

On Thanksgiving Day 2006, Haynes discovered that a white powder had been caked on the door handles of her

car. C.A. App. 277-278. That powder was the arsenic-based specialty chemical 10-chlorophenoxarsine. Pet. App. 95-96. Between that day and February 2007, Haynes suffered 24 more chemical attacks, most of which were made with 10-chlorophenoxarsine and some with an orange-reddish powder that turned out to be potassium dichromate. *Id.* at 49-50, 94-95. Haynes suffered from these attacks as many as three or four times a week over a period of three months. C.A. App. 281.

Haynes, a single mother, was forced to carry her toddler out to the car, to hold the child in one hand, and to use the other to check for and remove the chemicals that were repeatedly placed on her front and rear door handles. C.A. App. 280-284. Before finding out what the substances were, she would use the same free hand to give her child a toy, which the child would put in her mouth. *Id.* at 281-282. Many of the incidents involved her car, but Haynes also discovered chemicals deposited on the doorknob of her home and in her mailbox. Pet. App. 50. On one occasion, when she forgot to first clean her door knob, she sustained a chemical burn on her thumb. *Ibid.*

During the course of these attacks, Haynes repeatedly called local police. C.A. App. 279. They suggested that the substance might be cocaine and told Haynes to clean her car and door handles. *Id.* at 279-280, 284-285; Pet. App. 50. Haynes then turned to her postal carrier for help, and federal postal inspectors placed surveillance cameras in and around Haynes's home. *Ibid.* They identified petitioner as the perpetrator of the attacks and also saw petitioner stealing Haynes's mail. *Ibid.* After petitioner was arrested, she waived her rights and acknowledged that she had stolen one of the chemicals, 10-chlorophenoxarsine, from her employer.

Id. at 51. She obtained the other chemical over the Internet. *Id.* at 3.

Up until shortly before she began the chemical attacks aimed at Haynes, petitioner was employed by a multinational chemical manufacturer, Rohm & Haas, as a technical assistant in the Biocides Organization, which researched preservatives used to kill microorganisms in plastics and shampoos. C.A. App. 197-198. While she was at the company, she earned a master's degree in microbiology. *Id.* at 201.

The two chemicals that petitioner used to attack Haynes were toxic, and could be lethal, in small quantities, either orally or through skin exposure. Pet. App. 49 & n.1. One-half of a teaspoon of 10-chlorophenoxarsine could be lethal orally to an adult, while a toxic dose for a child would be a mere few crystals of the substance. C.A. App. 239-240, 245-246. One to one-and-one-half teaspoons could be lethal to the touch. *Id.* at 240. The other chemical used by petitioner, potassium dichromate, is lethal in even smaller quantities; less than one-quarter of a teaspoon ingested orally could be lethal for an adult, while a few crystals could be lethal for a child. *Id.* at 252-253. The amounts of the chemicals left by petitioner on even a single occasion were many times the amounts required for toxic or potentially lethal doses. *Id.* at 248-249, 253-254.

3. A grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner with two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and two counts of theft of mail, in violation of 18 U.S.C. 1708. Pet. App. 51; Indictment Count 1, ¶ 4, Count 2, ¶ 2. Petitioner moved to dismiss the chemical weapons counts on the ground that Congress had exceeded its Article I authori-

ty in enacting Section 229. Pet. App. 51. In particular, she argued that "neither the Commerce Clause, nor the Necessary and Proper Clause in connection with the Treaty Power, could support" 18 U.S.C. 229. Pet. App. 4. In response, the government stated that Congress had not cited its commerce power in enacting Section 229 but had instead invoked its "authority to implement treaties." Gov't Resp. to Mot. to Dismiss Counts 1 and 2 of the Indictment 7, 2:07-cr-528 Docket entry No. 30 (Nov. 13, 2007). The government defended the statute as an exercise of Congress's power under the Necessary and Proper Clause to implement a valid treaty. See *id.* at 7-8.

The district court denied the motion to dismiss, holding that the statute was validly "enacted by Congress and signed by the President under the necessary and proper clause" to "comply with the provisions of a treaty." Pet. App. 75. The district court noted that "[o]ne could make an argument, of course, that there is a federal interest" under the Commerce Clause "beyond the [treaty-based] interest enumerated by Congress" in enacting the statute. *Ibid.* The Court, however, thought it was "bound to look only at the reasons for the enactment of the statute [given] by Congress," so it did not address the question whether Section 229 was authorized by the commerce power. *Ibid.*

The district court also found that the statute plainly applied to petitioner's conduct. "[I]t is clear that if anybody uses a toxic chemical for other than peaceful purposes, the person can be prosecuted." Pet. App. 75. Under the statute, "one need only have to know that [the chemical] is a chemical that could do harm to another person's body and use it for purposes of harming or

attempting to harm another person in the way in which that harm is described in the statute." *Id.* at 75-76.

Petitioner entered a conditional guilty plea to all four counts of the indictment, reserving her right to challenge the district court's denial of the motion to dismiss. Pet. App. 52; see also *id.* at 80 (petitioner's counsel informing district court that "it's never been the contention of [petitioner] to fight this case on the facts").

4. On appeal, petitioner renewed her argument that Congress could not "utilize international treaties to enact criminal legislation addressing subjects that are otherwise beyond Congress's legislative powers." 2008 Pet. C.A. Br. 17. In response, the government argued that "[b]ecause the statute * * * was enacted pursuant to a valid international treaty, it is supported by Congress' treaty power and the Necessary and Proper Clause." 2008 Gov't C.A. Br. 18. "As a consequence," the government explained, "that statute does not violate the Tenth Amendment by infringing on the states' reserved powers." *Ibid.*; see *id.* at 27.

Following oral argument, the court of appeals requested supplemental briefing on the question whether petitioner "ha[s] standing to assert that 18 U.S.C. [Section] 229 encroaches on state sovereignty in violation of the Tenth Amendment to the United States Constitution absent the involvement of a state or its instrumentalities." Pet. App. 5 n.2. The government then argued that petitioner did not have standing to assert her Tenth Amendment claim, see *ibid.*, and the court of appeals agreed, *id.* at 58-63.

The court of appeals also rejected petitioner's vagueness challenge to Section 229. Pet. App. 63-66. The court stated that the terms of Section 229 "are certainly broad" but found "no doubt that 'a person of reasonable

intelligence' would know that [petitioner's] conduct violated [Section] 229." *Id.* at 65. "Over a period of eight months, [petitioner] researched, stole, and deployed highly toxic chemicals with the intent of harming Haynes. Any one of her attacks could have delivered a lethal chemical dose to Haynes or her then-infant child." *Id.* at 65-66. Accordingly, "[petitioner's] actions * * * clearly constituted unlawful possession and use of a chemical weapon under [Section] 229." *Id.* at 66.

5. This Court granted certiorari to address the limited question "whether a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States." *Bond* v. *United States*, 131 S. Ct. 2355, 2360 (2011). Having changed its position on standing, the government filed a brief in support of petitioner's argument that she had standing to challenge her conviction.

This Court reversed and remanded, see *Bond*, 131 S. Ct. at 2367, holding that, in an appropriate case, an individual litigant may challenge a law on the ground that it contravenes principles of federalism. *Id.* at 2365-2366. The Court indicated that "[t]he ultimate issue of the statute's validity turns in part on whether the law can be deemed 'necessary and proper for carrying into Execution' the President's Article II, § 2 Treaty Power," but it "expresse[d] no view on the merits of that argument." *Id.* at 2367.

6. On remand, the Third Circuit affirmed petitioner's conviction. Pet. App. 1-47.

a. The court of appeals first addressed petitioner's argument that the statute should be construed not to apply to her conduct. Pet. App. 8-12. Petitioner assert-

ed that her conduct fell within the statute's exception for use of a toxic substance for a "peaceful purpose," which she said should comprise any activity that was not "war-like." *Id.* at 9. According to petitioner, her proposed construction of the statute would place outside the scope of the statute's prohibition "conduct that no signatory state could possibly engage in." *Ibid.*

The court of appeals rejected that interpretation, concluding as it had in its prior decision that petitioner's "behavior 'clearly constituted unlawful possession and use of a chemical weapon under [Section] 229.'" Pet. App. 10 (quoting Pet. App. 66)). The court explained that petitioner's use of "highly toxic chemicals with the intent of harming Haynes, can hardly be characterized as 'peaceful' under that word's commonly understood meaning." *Id.* at 10-11 (citation omitted). The court concluded that because "the language [of Section 229] itself does cover [petitioner's] criminal conduct," it was not the court's "prerogative to rewrite a statute, and [it saw] no sound basis on which [it could] accept [petitioner's] construction of the Act without usurping Congress's legislative role." *Id.* at 11-12.

b. The court of appeals also rejected petitioner's constitutional objection to her conviction. See Pet. App. 12-36.

The court emphasized that this case did not present the question "whether an arguably invalid treaty has led to legislation encroaching on matters traditionally left to the police powers of the states." Pet. App. 20. Indeed, petitioner conceded that the Convention was a valid exercise of the treaty power. *Ibid.*; see *id.* at 38 (Rendell, J., concurring) (noting that petitioner "unequivocally concedes" that "the Convention itself is valid"). The court concluded that petitioner's concession was appro-

priate. It explained that, "[w]hatever the Treaty Power's proper bounds may be, * * * we are confident that the Convention we are dealing with here falls comfortably within them" because it regulates the proliferation and use of chemical weapons. *Id.* at 26. The Convention "is valid under any reasonable conception of the Treaty Power's scope." *Ibid.*

The court of appeals also concluded that Section 229 was "necessary and proper to carry the Convention into effect." Pet. App. 27. The court of appeals noted that this Court in *Missouri* v. *Holland*, 252 U.S. 416 (1920), had stated that "[i]f the treaty is valid there can be no dispute about the validity of the statute" implementing it "as a necessary and proper means to execute the powers of the Government." Pet. App. 27 (quoting 252 U.S. at 432); see *id.* at 31. Accordingly, the court of appeals concluded that the Act is constitutional "unless it somehow goes beyond the Convention." *Id.* at 33-34. The court held that the Act did not go beyond the Convention in any relevant sense; instead, the treaty and the statute "are coextensive at least on the question of 'use,' which is the only point relevant to [petitioner's] as-applied challenge." *Id.* at 29 n.15; see also *id.* at 34 (rejecting petitioner's argument that Section 229 "covers a range of activity not actually banned by the Convention" and that the statute "cannot be sustained by the Necessary and Proper Clause" for that reason).

Given its conclusion that the Act is constitutional, the court held that its application to petitioner did not "disrupt[] the balance of power between the federal government and the states." Pet. App. 36. It based that conclusion on this Court's holding in the context of Congress's commerce power that "where the class of activities is regulated and that class is within the reach of

federal power, the courts have no power to excise, as trivial, individual instances of the class." *Ibid.* (quoting *Gonzales* v. *Raich*, 545 U.S. 1, 23 (2005)).

In the alternative, the court of appeals also considered how federalism claims like petitioner's might be approached here if *Holland* had not resolved the constitutional question. Pet. App. 31 n.18. It concluded that, even under such an approach, petitioner's claim would still fail. The court noted that the framers of the Constitution did not "defin[e] the limits of the Treaty Power because they decided its scope required flexibility in the face of unknowable future events." *Ibid.* Moreover, the court said, "any attempt to precisely define a subject matter limitation on the Treaty Power would involve political judgments beyond [courts'] ken." *Ibid.* Nonetheless, imagining a world without *Holland*, the court posited that it might still be possible to identify "certain kinds of treaties" that would "fall within the core of [the treaty] power, namely those dealing with war, peace, foreign commerce, and diplomacy directed to those ends." *Ibid.*

Under this alternative approach, the court explained that the Tenth Amendment would still have "nothing meaningful to say" with respect to statutes implementing treaties lying at the core of the treaty power. Pet. App. 32 n.18. But federalism principles might lead to a different outcome where a treaty "plainly f[e]ll outside" "the traditionally understood bounds of the Treaty Power," or even "[b]efore the outer limits of the treaty power are reached." *Id.* at 32-33 n.18. The court emphasized, however, that no such inquiry was called for here. *Ibid.* As the court had previously explained, "[g]iven its quintessentially international character, * * * the

Convention is valid under any reasonable conception of the Treaty Power's scope." *Id.* at 26; see *id.* at 27.

Having concluded that the Act was a valid exercise of Congress's necessary and proper authority to implement the Convention, the court did not express an opinion on the government's alternative argument that the Act was also a valid exercise of Congress's commerce power. Pet. App. 27 n.14.

Judge Rendell filed a concurrence. See Pet. App. 37-44. She emphasized that it was undisputed that the Convention was within the treaty power and explained that the Act was a necessary and proper way of implementing it. See *id.* at 38. "Enacting a statute that essentially mirrors the terms of an underlying treaty is plainly a means which is 'reasonably adapted to the attainment of a legitimate end.'" *Ibid.* (quoting *United States* v. *Comstock*, 130 S. Ct. 1949, 1957 (2010)). And, Judge Rendell explained, because the Act is constitutional, no further necessary and proper inquiry was appropriate with respect to its particular application to petitioner. See *id.* at 38-39. "The fact that an otherwise constitutional federal statute might criminalize conduct considered to be local does not render that particular criminalization unconstitutional." *Id.* at 40 (citing *Raich*, 545 U.S. at 23).

Judge Ambro also filed a concurrence (Pet. App. 45-47) in which he "urge[d] the Supreme Court to provide a clarifying explanation of its statement in *Missouri* v. *Holland* that '[i]f [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government.'" *Id.* at 45 (quoting 252 U.S. at 432) (brackets in original).

ARGUMENT

Petitioner asks the Court to grant her petition for a writ of certiorari to reconsider *Missouri* v. *Holland*, 252 U.S. 416 (1920), and to enforce asserted federalism-based limitations on "the federal government's authority to criminalize purely local conduct when seeking to implement treaties" (Pet. 17). She also asks the Court to consider her proffered limiting construction of 18 U.S.C. 229 as a means of avoiding those constitutional questions. This petition is not an appropriate vehicle for consideration of either question. Congress had independent authority under its commerce and necessary-and-proper-clause powers to enact the Act, so the statute is valid without regard to petitioner's treaty-power claim. Additionally, the court below correctly applied *Missouri* v. *Holland* to uphold Section 229. No other court of appeals has considered that issue, and the circuits have reached no conflicting results in the interpretation of *Holland* in other contexts. And, even assuming there were federalism limits on Congress's powers under the Necessary and Proper Clause when implementing a treaty, the exercise of federal authority here would not implicate them. Finally, petitioner would not even benefit from her own limiting construction—which has no basis in the statute in any event—because her actions were anything but "peaceful." Further review is not warranted.

1. Petitioner asks the Court to grant her petition and hold that "legislation enacted to implement a treaty must be a valid exercise of either some specific enumerated power or the Necessary and Proper Clause." Pet. 27-28. That test is plainly satisfied in this case for a reason not addressed by the petition: the Act is a valid exercise of Congress's commerce and necessary-and-

proper-clause power. The portion of the Act applied to petitioner would be within Congress's constitutional authority on this basis even if no treaty underlay it. This case accordingly does not present a suitable vehicle for addressing the question petitioner presents on the meaning and viability of *Holland*, *supra*, because her conviction is valid without regard to that claim.

a. Section 229 makes it unlawful for any person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1). As this Court explained in *Gonzales* v. *Raich*, 545 U.S. 1, 26 (2005), "[p]rohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product."

To illustrate this point, the Court in *Raich* cited a series of criminal statutes that are materially indistinguishable from Section 229. 545 U.S. at 26 n.36. Those statutes include: 18 U.S.C. 175(a), which implements the Biological Weapons Convention by making it unlawful to "knowingly develop[], produce[], stockpile[], transfer[], acquire[], retain[], or possess[] any biological agent, toxin, or delivery system for use as a weapon"; 18 U.S.C. 831, which implements the Convention on the Physical Protection of Nuclear Material by making it unlawful under certain circumstances to "receive[], possess[], use[], transfer[], alter[], dispose[] of, or disperse[] any nuclear material"; and 18 U.S.C. 842(n)(1), the statute implementing the Plastic Explosives Convention by making it unlawful "to ship, transport, transfer, receive,

or possess any plastic explosive that does not contain a detection agent."[1]

Raich's citation of these statutes makes clear that Congress may regulate the intrastate possession, manufacture, and distribution of these weapons as part of its regulation of the interstate market, just as Congress validly placed similar restrictions on homegrown marijuana. See 545 U.S. at 16-22. The same is true for the chemical weapons regulated by Section 229. Section 229, like the statute in *Raich*, is part of a "comprehensive framework" for prohibiting "the production, distribution, and possession" of chemical weapons. *Id.* at 24; see Pet. App. 147 (Convention preamble explains that "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of" the objective of eliminating weapons of mass destruction). Congress could rationally have concluded that the intrastate possession, manufacture, and distribution of these weapons substantially affects interstate commerce and must be restricted to control the interstate market. See *Raich*, 545 U.S. at 16-19; *id.* at 33-34, 39-41 (Scalia, J., concurring) (invoking Necessary and Proper Clause in combination with the Commerce

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[1] See Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163; Convention on the Physical Protection of Nuclear Material, *opened for signature* Mar. 3, 1980, T.I.A.S. No. 11,080, 1456 U.N.T.S. 101; Convention on the Marking of Plastic Explosives for the Purpose of Detection, 30 I.L.M. 721, ICAO Doc. 9571 (Mar. 1, 1991).

Clause); see also 18 U.S.C. 229F(7) (statutory carve-out for trade in chemicals with legitimate uses).

Congress likewise could have rationally concluded, as the Convention's preamble expressly stated, that "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons" was a "necessary step" toward "promot[ing] free trade in chemicals," Pet. App. 147, placing the Act within Congress's power over foreign commerce as well. Indeed, the Chemical Manufacturers Association (CMA), which was deeply involved in the development of the Convention, supported ratification of the Convention in part because the American chemical industry "produce[s] commercial chemicals which can be illegally converted into weapons." *Chemical Weapons Convention: Hearings Before the Senate Comm. on Foreign Relations*, 103d Cong., 2d Sess. 90 (1994) (*Hearings*) (statement of Dr. Will Carpenter, CMA). The CMA explained that it supported the Convention's protections against diversion of such chemicals because those protections "could have the positive effect of liberalizing the existing system of export controls applicable to [the chemical] industry's products, technologies and processes." *Ibid.* And the Convention itself regulates international trade in chemicals by, among other things, prohibiting signatories from exporting certain scheduled toxic chemicals to non-signatory countries. See Convention, Verification Annex, Part VII, ¶ 31; see also *Hearings* 12 (statement of John D. Holum, director, United States Arms Control and Disarmament Agency) ("States remaining outside the Convention will be denied access to State Party trade in specified chemicals that are important not only to

[chemical weapon] production but also to industrial development and growth.").

Because Section 229 is valid under Congress's commerce and necessary-and-proper power, this case is not an appropriate vehicle for considering the question petitioner presents about the limits on Congress's power when implementing a treaty in the absence of some other enumerated basis for the legislation. Nor does the commerce-power basis for Section 229 merit review in its own right. No division in the courts of appeals exists on that question. Indeed, no court of appeals has even addressed it. "This Court * * * is one of final review, 'not first view.'" *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (declining to address a constitutional question not decided below) (citation omitted).

b. In the court of appeals, petitioner contended that the government's commerce-power defense of Section 229 is waived because the government did not advance it in the district court or in the court of appeals the first time the case was there. 2011 Pet. C.A. Reply Br. 22. The court of appeals, however, did not find the claim waived, see Pet. App. 27 n.14 (court "express[ing] no opinion" on commerce authority for Section 229), and it is not.

"A statute is presumed constitutional * * * and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993) (quoting *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)) (brackets in original). "[J]udging the constitutionality of an Act of Congress is 'the gravest and most delicate duty that this Court is called on to perform.'" *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U.S. 193, 204 (2009) (quoting *Blodgett* v.

Holden, 275 U.S. 142, 147-148 (1927)). The respect due a coordinate branch counsels against invalidating an Act of Congress as in excess of its Article I authority without considering available grounds for upholding the law.

In the district court, the government stated that "Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties." Gov't Resp. to Mot. to Dismiss Counts 1 and 2 of the Indictment 7. That description of what power Congress expressly invoked at the time of the statute's enactment does not mean that other bases of authority are unavailable to defend the statute. To the contrary, "[t]he question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948); see *United States* v. *Shi*, 525 F.3d 709, 721 (9th Cir.) (treaty-implementing legislation may draw on multiple sources of constitutional authority), cert. denied, 555 U.S. 934 (2008). Accordingly, the Court in *Raich* cited a number of statutes enacted to implement treaties as examples of legislation within Congress's commerce power. See p. 14, *supra*.

2. Even putting aside the alternative basis for affirmance of the judgment below, the petition would not warrant this Court's review. Petitioner was prosecuted under a statute that closely tracks an international treaty she "unequivocally concedes" is "valid." Pet. App. 38 (Rendell, J., concurring). Her conduct fell squarely within the terms of that statute. The court of appeals accordingly recognized that, even assuming *arguendo* that federalism principles placed limits on Congress's power under the Necessary and Proper Clause to implement a treaty, no such limits would have been

breached here. Moreover, the court of appeals correctly applied *Holland*—a longstanding precedent about which there is no disagreement or confusion in the circuits—to this case.

a. The court of appeals explained that petitioner's claim fails under the rule of *Holland* that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432; see Pet. App. 31 & n.18. But even setting aside *Holland*, the court said it would be untroubled by the exercise of federal authority in this case because, "[w]hatever the Treaty Power's proper bounds may be," it was "confident that the Convention [it was] dealing with here falls comfortably within them." *Id.* at 26.

The Act's terms very closely track those of the concededly-valid Convention in all material respects, see Pet. App. at 28-29 n.15; see also *id.* at 34-35, so there is no argument that the Act goes beyond the scope of the Convention. Further, even assuming that federalism principles had a role to play in evaluating the validity of treaty-based legislation, as explained below, the Act would not infringe on such hypothetical federalism limits. See *id.* at 26-27, 31 n.18.

Petitioner nowhere plainly explains what her proposed test for the constitutionality of treaty-implementing legislation should be. She appears to assert that her prosecution contravenes federalism principles because Pennsylvania could have prosecuted her for assault, but it is well-settled that the Constitution does not prohibit federal prosecution in an area of overlapping federal and state authority. See Pet. App. 41 (Rendell, J., concurring) ("Instances of overlapping federal and state criminalization of similar conduct abound.");

see also, *e.g.*, *Cleveland* v. *United States*, 329 U.S. 14, 16 (1946) (Mann Act's criminalization of interstate transportation for "purpose of prostitution or debauchery, or for any other immoral purpose" not unconstitutional invasion of traditional area of state regulation); *United States* v. *Johnson*, 114 F.3d 476, 481 (4th Cir.) ("[f]ederal laws criminalizing conduct within traditional areas of state law, whether the states criminalize the same conduct or decline to criminalize it, are of course commonplace under the dual-sovereign concept and involve no infringement *per se* of states' sovereignty in the administration of their criminal laws"), cert. denied, 522 U.S. 904 (1997).

Under the dual-sovereign doctrine, Pennsylvania remained free to prosecute petitioner for assault notwithstanding the federal prosecution. See *Department of Revenue of Mont.* v. *Kurth Ranch*, 511 U.S. 767, 782 n.22 (1994). This federal prosecution therefore in no way impinged on Pennsylvania's sovereign powers. Indeed, the Act, which did not preempt any Pennsylvania law, has less of an impact on state prerogatives than other historic exercises of the treaty power. See, *e.g.*, *Hopkirk* v. *Bell*, 7 U.S. (3 Cranch) 454, 458 (1806) (treaty between United States and Great Britain ending Revolutionary War preempted state statute of limitations for recovery of a debt); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796).

Petitioner is incorrect that, assuming that federalism principles apply to legislation implementing a valid treaty, Congress violated such limitations by not deferring to state law to implement "any treaty obligation the United States had to criminalize her conduct." Pet. 27. The Necessary and Proper Clause affords Congress discretion to decide how best to execute the powers set

forth in the Constitution. See *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (explaining that the "constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people"). In fact, because the relevant provisions of the Convention are not directly judicially enforceable, the absence of federal legislation to implement the Convention's requirements could have left the federal government without adequate means to ensure the United States' compliance with the Convention.

Petitioner's argument echoes one side of a debate that occurred leading up to the Constitutional Convention regarding the treaty power. That debate was textually resolved in the Constitution, which granted the treaty power to the Executive, with advice and consent by the Senate. U.S. Const. Art. II, § 2. The Framers made that choice because of the government's inability, under the Articles of Confederation, to induce the states to implement treaties. See, *e.g.*, *The Federalist*, No. 42, at 264 (James Madison); No. 22, at 150-151 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Samuel B. Crandall, *Treaties: Their Making and Enforcement* 34-35, 51-52 (2d ed. 1916). The Constitution also expressly withheld the treaty power from the States. U.S. Const. Art. I, § 10. Thus it cannot be said that the decision below represents a "reconfigur[ing]" of constitutional structures (Pet. 24).

Moreover, a rule that Congress cannot exercise its power to implement treaties if a state law provision arguably overlaps with a treaty requirement (Pet. 26-27) would be wholly unworkable. Congress would have to

conduct 50-state surveys of state law, and perhaps of municipal law as well, for each treaty provision to determine if the provision were implemented locally. Under petitioner's reading, such surveys would also have to ascertain whether provisions that were not directly related to the subject matter (*e.g.*, assault laws) might overlap with the treaty provisions. In this case, the government has never maintained (cf. Pet. 13) that state law would be sufficient to implement the Convention, and petitioner's premise that a generic assault statute would adequately implement the Nation's treaty obligations to restrict not only the use, but also the development, production, acquisition, retention, and transfer, of toxic chemicals is not tenable.

Petitioner claims that *Medellin* v. *Texas*, 552 U.S. 491 (2008), supports her view that the federal government should have deferred to state law rather than enacting Section 229. Pet. 27. But *Medellin*, to the extent that it is relevant to this case, demonstrates petitioner's error. The *Medellin* Court held that "[t]he responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress." *Id.* at 525-526. *Medellin* found ineffective a presidential memorandum that directed States to comply with a judgment of the International Court of Justice regarding the Vienna Convention on Consular Relations. Instead, it was *Congress* under the Constitution that had the power to give effect to the international decision. *Ibid.* (And, of course, in this case Congress did act.) The facts in *Medellin* also illustrate the fundamental flaw in petitioner's proposed reliance on States to execute the United States' international obligations. Because the actions of the State of Texas did not fulfill the United States' international obligations, the United

States was found in breach of the Vienna Convention. See *Medellin* v. *Texas*, 554 U.S. 759 (2008) (per curiam).

Finally, there is no requirement that the government establish that the prosecution of petitioner in particular "is necessary and proper to complying with the Convention." Pet. App. 39 (Rendell, J., concurring). This Court "ha[s] often reiterated that '[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class.'" *Raich*, 545 U.S. at 23 (quoting *Perez* v. *United States*, 402 U.S. 146, 154 (1971)) (some internal quotation marks omitted; brackets in original).

b. In any event, the court below correctly followed this Court's well-settled precedent holding that federalism principles do not impose a limit on the subjects that can be addressed in a treaty or in treaty-implementing legislation. No disagreement exists in the courts of appeals on that question, and further review is not warranted.

i. In *Holland*, the State of Missouri, seeking to prevent a federal game warden from enforcing the Migratory Bird Treaty Act and accompanying regulations, argued that "the treaty and statute are void as an interference with the rights reserved to the States." 252 U.S. at 432. This Court disagreed. The Court explained that the Tenth Amendment did not operate as a limitation on the treaty power because that amendment applied to powers "not delegated to the United States," while the treaty power was "delegated expressly" to the federal government. *Ibid.*; cf. *United States* v. *Comstock*, 130 S. Ct. 1949, 1962 (2010) (finding that the Tenth Amendment was not applicable to a statute enacted under the Necessary and Proper Clause "[v]irtually by definition"

because the necessary-and-proper power, as an Article I power, is "not [a] power[] that the Constitution 'reserved to the States'") (citation omitted).

Accordingly, the Court in *Holland* held that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. The Court noted that it did not "mean to imply that there are no qualifications to the treaty-making power," *id.* at 433, but determined that the Tenth Amendment did not restrict that power through "some invisible radiation." *Id.* at 434. Instead, the Court considered only whether the treaty violated other constitutional provisions; because it did "not contravene any prohibitory words to be found in the Constitution," it was valid. *Id.* at 433.

Holland does not contemplate that the courts will "balance" federal and state interests in enacting legislation to implement a treaty, as petitioner suggests. Cf. Pet. 25-26. While the *Holland* Court mentioned the "slender reed" of the State's interest and the "national interest of very nearly the first magnitude" in that case, its holding was not premised on the weight of the interests but on the explicit allocation of power to the federal government: "No doubt the great body of private relations usually fall within the control of the State, but a treaty may override its power." 252 U.S. at 434-435.

Nor is the *Holland* Court's holding that Congress indisputably has necessary-and-proper power to implement the treaty "dictum," as petitioner would characterize it (Pet. 25). Indeed, adoption of petitioner's position would require this Court to reject a settled understanding of *Holland* that reflects the unique national interests furthered by treaties above and beyond the local inter-

ests of the States. See *United States* v. *Lara*, 541 U.S. 193, 201 (2004) (reaffirming *Holland*'s interpretation of the treaty and necessary-and-proper powers). Reconsidering that settled understanding is unwarranted—especially in this case, where Section 229 is valid under the commerce power.

ii. Contrary to petitioner's suggestion (Pet. 20-22), the courts of appeals are not divided on the meaning of *Holland*, a 90-year-old precedent of this Court. She fails to cite a single court of appeals decision that invalidated legislation implementing a treaty on federalism (or any other) grounds. Several of the decisions she cites simply state the rule that legislation implementing a treaty must comply with the Constitution's express limitations on government power, such as those found in the Bill of Rights.[2] *Holland* itself invoked that principle, see 252 U.S. at 433 (noting that the treaty before the Court "does not contravene any prohibitory words to be found in the Constitution"), and a plurality of the Court again expressly stated it in *Reid* v. *Covert*, 354 U.S. 1, 16-19 (1957). *Reid* explained that application of the Constitution's limitations to treaty-implementing legislation was entirely consistent with *Holland* because "the treaty involved" in that case "was not inconsistent with any specific provision of the Constitution," *Reid*, 354 U.S. at 18. At the same time, the *Reid* plurality

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[2] See, *e.g.*, *Plaster* v. *United States*, 720 F.2d 340, 348 (4th Cir. 1983) (citing *Reid* v. *Covert*, 354 U.S. 1, 16-19 (1957) (plurality opinion), and involving due process claim); *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1308-1309 (9th Cir. 1982) (citing *Reid*, 354 U.S. at 16-19, and involving due process and equal protection claims); *Chas T. Main Int'l, Inc.* v. *Khuzestan Water & Power Auth.*, 651 F.2d 800, 813 n.20 (1st Cir. 1981) (citing *Reid*, 354 U.S. at 15-19, and involving takings claim).

went on to explain that, "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier." *Ibid.* Accordingly, court of appeals cases relying on *Reid* do not reflect any disagreement on the meaning of *Holland*.[3]

The only court of appeals decisions petitioner cites that are relevant to the question presented here are those that *rejected* federalism or enumerated powers challenges to the statute implementing the International Convention Against the Taking of Hostages. See Pet. 21-22 (citing *United States* v. *Lue*, 134 F.3d 79, 84 (2d Cir. 1988), and *United States* v. *Ferreira*, 275 F.3d 1020, 1027-1028 (11th Cir. 2001), cert. denied, 535 U.S. 977, 535 U.S. 1028, and 537 U.S. 926 (2002)); see also *United States* v. *Belfast*, 611 F.3d 783, 803-809 (11th Cir. 2010) (rejecting enumerated powers challenge to statute implementing the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), cert. denied, 131 S. Ct. 1511 (2011). As petitioner recognizes (Pet. 21), those decisions are entirely consistent with the one below in this case.

In the absence of disagreement or confusion in the courts of appeals about *Holland*, no warrant for further

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[3] *Power Authority of N.Y.* v. *Federal Power Commission*, 247 F.2d 538 (D.C. Cir. 1957), also cited by petitioner (Pet. 21) as among cases holding that there are Tenth Amendment limitations on legislation implementing a treaty, "d[id] not decide the constitutional question," *id.* at 543, and was subsequently vacated by this Court, see *American Pub. Power Ass'n* v. *Power Auth. of State of N.Y.*, 355 U.S. 64 (1957). *Holmes* v. *Laird*, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972), did not involve a Tenth Amendment claim, and, in any event, the court concluded that any constitutional question was "beside the point," *id.* at 1217.

review exists. Petitioner fails to point to any genuine problem with Congress's use of its power to implement treaties. Constitutional limitations on the treaty process, including the requirement for the concurrence of a two-thirds majority of the Senators voting, make such hypothetical uses unlikely. Finally, as discussed above, granting this petition to consider the viability of *Holland* would be particularly unwarranted because of the clear non-treaty-based ground for affirming the judgment below.

3. Petitioner also urges the Court to read the Act to exclude her conduct in order to avoid the constitutional question she presents. Pet. ii.[4] She does not claim any conflict in the courts of appeals on the meaning of the statute, and none exists.[5] Moreover, petitioner's pro-

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[4] In *Ghane* v. *United States*, petition for cert. pending, No. 12-5318 (filed July 16, 2012), the petitioner advances a different limiting construction of Section 229, *i.e.*, that it "exempts from criminality an individual's use of toxic chemicals without the intent to harm another person." *Ghane* Pet. 17. Petitioner does not advance that claim. Nor does petitioner here assert the vagueness or overbreadth claims asserted by the petitioner in *Ghane*.

[5] Charges are not brought frequently under the Act. Only five cases other than this one have led to Westlaw opinions mentioning the charge. See *United States* v. *Ghane*, 673 F.3d 771 (8th Cir. 2012), petition for cert. pending, No. 12-5318 (filed July 16, 2012); *United States* v. *Crocker*, 260 Fed. Appx. 794 (6th Cir.) (conviction based on attempts to acquire VX nerve gas), cert. denied, 553 U.S. 1060 (2008); *United States* v. *Krar*, 134 Fed. Appx. 662 (5th Cir. 2005) (conviction based on possession of sodium cyanide and other chemicals); *United States* v. *Fries*, No. CR-11-1751, 2012 WL 689157 (D. Ariz. Feb. 28, 2012) (charge based on alleged plan to generate deadly chlorine gas); *United States* v. *Kassir*, No. 04cr356, 2009 WL 2913651, at *1 n.2 (S.D.N.Y. Sept. 11, 2009) (noting that the government had voluntarily dismissed Section 229 count).

posed rewriting of the statute is unwarranted and would not even benefit her.

As explained above, no serious constitutional question exists regarding the Act, so the doctrine of constitutional doubt is inapplicable here. In addition, the doctrine of constitutional avoidance is not implicated because the statutory language is clear. See *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 227-228 (2008); *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 471 (2001). Here, the statute unambiguously encompasses petitioner's conduct, as the Third Circuit has twice decided. See Pet. App. 10, 66. The statute bars possession and use of toxic chemicals, whose definition indisputably includes the chemicals petitioner used here. 18 U.S.C. 229, 229F. Petitioner suggests that she should have benefited from an exception in the statute for toxic chemicals used for "[a]ny peaceful purpose." 18 U.S.C. 229F(7)(A). But no reasonable construction of that phrase would cover petitioner's conduct. Petitioner's "deployment of highly toxic chemicals with the intent of harming Haynes can hardly be characterized as 'peaceful' under that word's commonly understood meaning." Pet. App. 10-11 (brackets and citation omitted). "Any one of her attacks could have delivered a lethal chemical dose to Haynes or her then-infant child." *Id.* at 66. Those attacks were hardly peaceful.

Petitioner proposes that "peaceful" should mean "non-warlike." Pet. 31. But no basis for this limiting construction appears in the Act. Relatedly, she posits that the Convention requires only the prohibition of "conduct by private parties that would violate the Convention if undertaken by signatory states" and contends that her conduct would not be a violation if committed by a State Party to the Convention. *Id.* at 30. This ar-

gument is similarly unsound. If a State Party to the Convention were to develop, produce, or stockpile 10-chlorophenoxarsine and potassium dichromate outside of the peaceful purposes outlined in the Convention, or were to use those toxic chemicals against an adversary, the state's conduct would plainly have violated the Convention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF

RECORD
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BRIEFS

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In the
Supreme Court of the United States

CAROL ANNE BOND,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF

The government's opposition embraces an extreme reading of *Missouri v. Holland*, 252 U.S. 416 (1920), that only underscores the need for this Court's review. While the Solicitor General previously disclaimed the rather remarkable proposition that the President, the Senate, and a foreign nation may by their mutual agreement expand Congress' power beyond its enumerated limits, the government now endorses that position. Equally troubling, the government rejects any effort to construe 18 U.S.C. § 229 to give it a sensible and constitutional scope. And although the government attempts to revive its abandoned Commerce Clause defense, that argument was expressly waived long ago and with good reason: Section 229 was manifestly an effort to implement the Chemical Weapons Convention, not to regulate commerce. In short, the government's opposition highlights the point Judge Ambro made in his concurrence: The government's sweeping interpretation of *Holland* is untenable, and only this Court can clarify that there is no treaty power exception to our basic system of limited and enumerated congressional power.

I. The Government's Sweeping Vision Of Congress' Treaty-Implementing Power Underscores The Need For This Court's Review.

The government does not and cannot dispute that the Third Circuit recognized the importance of the issues presented. Indeed, the Third Circuit acknowledged that its interpretation of *Holland* "runs a significant risk of disrupting the delicate balance

between state and federal authority," which is why it invited this Court to "elucidate" *Holland*'s "uncompromising language." Pet.App.18-19, 31 & n.18, 33. And Judge Ambro emphatically "urge[d]" the Court to "clarify (indeed curtail) the contours of federal power to enact laws that intrude" on local matters when implementing treaties. Pet.App.45, 47.

Although the government ignores the Third Circuit's request for guidance and does its best to downplay this case's significance, its unambiguous embrace of the most sweeping interpretation of *Holland* highlights the importance of the questions presented. When previously confronted with the untenable consequences of a broad reading of *Holland*, the Solicitor General appeared to recognize the need for restraint. Asked whether Congress could acquire additional powers "by simply obtaining the agreement of the Senate, the President, and Zimbabwe," the Solicitor General rejected the notion that "a treaty can expand the powers of the federal government." Tr.31:21-32:04, *Golan v. Holder* (U.S. No. 10-545). Without even acknowledging its change in position (although the petition invoked this colloquy, Pet.22), the government now insists that "federalism principles do not impose a limit on the subjects that can be addressed in ... treaty-implementing legislation." Resp.23. The government's full embrace of that extreme position reinforces the need for this Court's intervention.

While ignoring the "split" in its own position, the government asserts that review is not warranted because "the courts of appeals are not divided on the meaning of *Holland*." Resp.25. That ignores what lower courts have actually said. The D.C. Circuit's

"grave doubt" that the treaty power can be employed to "deal with ... matters which normally and appropriately were within the local jurisdiction of the States," *Power Auth. v. Federal Power Comm'n*, 247 F.2d 538, 543 (1957), cannot be squared with the Second Circuit's assertion that the treaty power is "not subject to meaningful limitation under the terms of the Tenth Amendment." *United States v. Lue*, 134 F.3d 79, 85 (1998); *see also* Pet.20-22 (describing confusion in lower courts). In short, the lower courts (and scholars) are confused over the scope and meaning of *Holland*'s dictum. Pet.App.45.

In support of its broad reading of *Holland*, the government contends that treaty-implementing legislation need only "comply with the Constitution's express limitations on government power, such as those found in the Bill of Rights." Resp.25. But this Court has emphatically rejected the view that only the Constitution's negative constraints limit Congress or protect individual rights. One need look no further than this Court's earlier opinion for a ringing endorsement of the principle that the structural limits on federal power are critical both to "protect[] the liberty of the individual" and to "preserve[] the integrity, dignity, and residual sovereignty of the States." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). Nowhere does the government explain why the Court would bother to confirm petitioner's standing to vindicate structural limits on federal power if "federalism principles do not impose a limit on ... treaty-implementing legislation." Resp.23. Moreover, the Court did not even hint at a treaty power exception to the principle that "[i]mpermissible interference with state sovereignty is not within the

enumerated powers of the National Government," *Bond*, 131 S. Ct. at 2366, even though the court-appointed *amicus* sought a special treaty power rule, *see Amicus Curiae* Br. 38-42.

The government emphasizes petitioner's concession that the treaty is valid. But that just highlights the problem with the government's position and the need for this Court's review. The government assumes the universe of invalid legislation implementing valid treaties is a null set. Resp.19. But that assumption cannot be reconciled with either our constitutional structure or this Court's precedents. There are valid international treaties dealing with matters of traditional state control ranging from alcohol regulation to inheritance law to detention of foreign nationals arrested for local crimes. The government would put litigants and this Court to an artificial choice of attacking the treaty as wholly invalid or conceding that any federal implementing legislation is necessarily valid. Nothing in common sense or precedent supports that anomalous rule. *Holland* certainly does not, as the Court there engaged in the kind of federalism inquiry the government seeks to eliminate. *See* 252 U.S. at 434 (balancing state and federal interests in regulating migratory birds). And *Medellin v. Texas*, 552 U.S. 491 (2008), makes clear that the validity of a treaty does not ensure the validity of the federal government's efforts to implement it—even if the inevitable consequence of invaliding the latter is breach of the treaty.

The government contends that the power asserted here does "not infringe on" any "hypothetical federalism limits" on Congress' treaty-implementing

power because "Pennsylvania remained free to prosecute petitioner for assault." Resp.20. That gets matters backwards: Because the Constitution reserves the police power to the States, a federal law can raise federalism problems even if it duplicates a state exercise of the police power. Moreover, it is precisely because Pennsylvania (and every other State) has laws prohibiting malicious use of chemicals that the federal government could enter into a valid treaty on the subject without necessarily aggrandizing Congress' power. The government's narrow view of federalism is irreconcilable with this Court's precedents. As the Court has repeatedly admonished, Congress "significantly change[s] the federal-state balance" whenever it "renders traditionally local criminal conduct a matter for federal enforcement," regardless of whether it preempts state law in the process. *United States v. Bass*, 404 U.S. 336, 349-50 (1971).

That is particularly true here, as "[t]he law to which petitioner is subject, the prosecution she seeks to counter, and the punishment she must face might not have come about if the matter were left for the Commonwealth of Pennsylvania." *Bond*, 131 S. Ct. at 2366. And by the government's reading, the statute not only displaces state authority to decide whether to prosecute, but even overrides sensitive decisions whether poisonings resulting in death warrant the death penalty. *See* 18 U.S.C. § 229A(a)(2). The government's blithe insistence that the federal-state balance remains undisturbed because Congress did not go the final mile and preempt state law cannot be squared with this Court's skeptical review of comparable efforts to federalize "paradigmatic

common-law state crime[s]." *Jones v. United States*, 529 U.S. 848, 858 (2000).

The government fares no better with its contention that requiring Congress to respect state sovereignty when implementing treaties would require unduly burdensome inquiries into state law. Resp.21-22. Nothing would have been more efficient than granting Congress a police power, such that whether implementing treaties, regulating commerce, or assembling a standing army, Congress would never need to consult state law before legislating. But nothing would have been more antithetical to the Framers' design, which elevated many values above the efficiency of the national legislature. The Constitution grants Congress only limited and enumerated powers precisely because doing so makes it harder for Congress to interfere with matters best left to governments closer and more responsive to the people. To say that constitutional constraints on federal power are "to be governed by Congress's need for 'legislative flexibility'" or efficiency "is to deny federalism utterly." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 690 (1999). Indeed, to the extent the federal government is increasingly negotiating treaties on subjects traditionally the province of state and local governments, the need to stop and consider relevant state laws before deciding whether federal treaty-implementing legislation is wise, necessary, or even constitutional is a welcome check, not a regrettable inconvenience. In any event, it does not take a 50-state survey to confirm that States already criminalize garden-variety poisoning and assault.

II. The Government's Statutory Construction Creates Difficult Constitutional Questions That Can And Should Be Avoided.

There can be no serious dispute that the constitutional questions at hand are sufficiently difficult and the consequences of the government's position sufficiently alarming to warrant consideration of any construction of the statute that might avoid them. Serious constitutional questions arise *whenever* the federal government asserts jurisdiction over "paradigmatic common-law state crime[s]." *Jones*, 529 U.S. at 858 (applying narrowing construction to avoid question whether Congress could criminalize every arson); *see also Bass*, 404 U.S. at 349 (same as to firearm possession). Those concerns are particularly acute when, as here, the statute does not contain a jurisdictional element. *See United States v. Lopez*, 514 U.S. 549, 561 (1995); *United States v. Morrison*, 529 U.S. 598, 613 (2000). The same grave constitutional concerns that warranted a limiting construction to avoid giving the federal arson statute an unlimited sweep should apply with full force to avoid construing section 229 to reach garden-variety poisoning and assault.

The government resists petitioner's limiting construction, but fails to grapple with the consequences of its own extraordinarily broad reading of the statute. As Justice Alito pointed out at oral argument, the government's reading would make it a federal crime, potentially punishable by life imprisonment, to pour vinegar into a goldfish bowl. Tr.29:15-31:31, *Bond v. United States* (U.S. No. 09-1227). Such absurd results certainly counsel in favor of a limiting construction that would minimize

constitutional concerns while still implementing Congress' intent. Section 229 may be broad, but Congress plainly did not intend to make every assault or poisoning a federal crime. Instead, Congress intended to implement the Chemical Weapons Convention by making conduct forbidden to a signatory state unlawful if undertaken by a private individual. It is in that context that the term "peaceful purpose[s]," 18 U.S.C. § 229F(7)(A), permits a limiting construction. While neither poisoning a goldfish nor inflicting a thumb burn on a romantic rival is "peaceful" in one sense, neither is it the kind of warlike conduct that implicates an international arms-control agreement. Construing "peaceful purpose" to mean non-warlike would not just avoid constitutional concerns and absurd results, but would be more respectful of legislative intent.

The government's assurance that section 229 prosecutions are rare does not undercut the need for a limiting construction or the broader importance of the issues presented. To the contrary, the rarity of prosecutions weakens any claim that reaching conduct like petitioner's is somehow necessary to implement the treaty. Surely the rarity of comparable federal prosecutions is not owing to a sharp drop-off in poisoning crimes or assaults involving chemicals. Nor has the absence of such prosecutions been greeted with outcries and denunciations from our co-signatories to the Chemical Weapons Convention. To the contrary, poisonings and assaults occupy the time of state and local prosecutors, and no one thinks the decision whether to prosecute petitioner implicates the Convention or

the kind of horrific war-like acts a signatory could undertake.

In fact, there is no better illustration of the total misfit between the Convention and the government's unnecessarily broad statutory construction than its strained effort to analogize petitioner's conduct to a nation's stockpiling of chemicals to use against its adversary. Resp.29. This Court should not lightly presume Congress intended to equate exacting revenge on a romantic rival with stockpiling chemical weapons to use against a foreign nation when it approached the delicate task of translating the Convention's prohibitions on nations into meaningful prohibitions and punishments for individuals. And if Congress really was so totally blind to the federalism implications of its actions, that is all the more reason to make clear that pausing to consider the federalism implications of treaty-implementing legislation is not an inconvenience but a constitutional necessity.

III. The Government's Belated Commerce Clause Argument Is No Obstacle To Review.

Reflecting the weakness of its sweeping treaty-power arguments, the government seeks to revive an argument that section 229 is valid under the commerce power. Resp.13. But that argument is both waived and meritless. When the government raised the argument on remand, the court of appeals, which is intimately familiar with this case and its procedural history, correctly noted that the government had "[a]bandoned it affirmatively in the district court" and declined to consider it. 2011-11-28 C.A.Tr.31; Pet.App.27 n.14 (declining to consider "Government's newly-discovered Commerce Clause

argument"). The government now tries to recast its earlier disavowal as merely a "description of what power Congress expressly invoked at the time of the statute's enactment." Resp.18. But that ignores the context of the government's express waiver. When petitioner challenged section 229's constitutionality in district court, she initially argued that neither the treaty nor the commerce power justified the law and invoked Commerce Clause precedents such as *Lopez* and *Morrison*. The government responded by explaining that petitioner's commerce power arguments were misplaced because "Section 229 was not enacted under the interstate commerce authority but under Congress' authority to implement treaties." Gov't Resp. to Mot. to Dismiss 7 [Dist.Ct.Doc.30]. This language was not a bland recital of the power Congress expressly invoked at the time of passage, but, as the lower courts understood it, an affirmative disclaimer of reliance on the commerce power.

The government suggests that it may never waive an argument it later deems useful in defending the constitutionality of an act of Congress. Resp.17-18. But it does not cite a single case supporting this novel one-way ratchet theory of waiver, in which private litigants suffer the consequences of their litigation decisions but the government is free to revive abandoned arguments. Instead, it relies on inapposite cases holding that, in a facial challenge under the Equal Protection Clause, a challenger must negate any rational basis for a suspect classification, "whether or not the basis has a foundation in the [legislative] record." *Heller v. Doe*, 509 U.S. 312, 320-21 (1993). That principle of equal-protection jurisprudence addressing whether Congress must

articulate a rational basis when legislating is not a litigation-waiver doctrine at all. While Congress need not invoke a source of legislative power for a law to be upheld on that basis, that does not mean the executive may expressly foreswear reliance on a power only to revive it when its preferred theory encounters trouble.

In any event, the government was wise to disclaim its Commerce Clause argument because it is meritless. This is not a case in which Congress invoked one power but the statute is readily supported by another. The Commerce Clause is a complete misfit with section 229. Congress enacted section 229 to implement the Chemical Weapons Convention, not to regulate interstate commerce in useful chemicals. Indeed, when the government attempted at oral argument to analogize this case to *Gonzales v. Raich*, 545 U.S. 1 (2005), the Court's questions exposed the glaring disconnect: As Justice Scalia emphasized after the government had acknowledged its theory would reach malicious use of vinegar, the government cannot "really argue that this statute was designed to drive vinegar out of the interstate market." *Bond* Tr.31:17-19. Indeed, had Congress intended to regulate chemicals in interstate commerce, it would have included a jurisdictional element. *Cf. Lopez*, 514 U.S. at 561. But section 229 lacks any jurisdictional requirement, presumably because Congress was not concerned about a nexus between chemicals and commerce, but rather about the potential misuse of certain chemicals—whether or not they crossed state lines—in ways that implicate the Convention's concerns.

The government makes much of a footnote in *Raich* citing federal statutes implementing similar arms-control conventions as examples of statutes prohibiting possession or manufacture of articles of commerce. Resp.14. But that Congress has the power to eliminate certain items from interstate commerce does not mean that it has the power to criminalize the misuse of items in lawful commercial circulation. More important, the *Raich* Court had no information about how broadly the government interpreted the statutes it referenced. If the government applied the same limitless construction invoked in this prosecution to the biological weapons statute, the latter would reach a person with a cold who maliciously deployed his saliva to try to sicken another person (or animal). *Raich* neither endorsed such a bizarre construction nor remotely suggested that Congress could reach malicious spitting as a valid regulation of commerce in biological weapons.

The real problem with the government's belated revival of its commerce power argument is the same one that caused its abandonment in the first place. Section 229 is all about implementing the Chemical Weapons Convention and "was not enacted under" Congress' "interstate commerce authority," Gov't Resp. to Mot. to Dismiss 7, and thus does not require any nexus to commerce. Accordingly, section 229 must stand or fall under the treaty power. As construed by petitioner, the statute respects our constitutional structure while fully discharging our Nation's treaty obligations (especially when read against the backdrop of state and local laws criminalizing malicious uses of chemicals). As construed by the government, the statute squarely

implicates the merits of the government's enthusiastic and the court of appeals' reluctant embrace of a limitless reading of *Holland*. Either way, as Judge Ambro recognized, the need for this Court's review is imperative.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 12-158

In The
Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA.

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law.

ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), addressing a variety of issues of constitutional law.

The decision below essentially holds that the Treaty Power, together with the Necessary and Proper Clause, gives the federal government *carte blanche* to enlarge its own domestic authority, in complete disregard of principles of federalism. This case therefore gravely implicates a whole host of issues of interest to the ACLJ.

SUMMARY OF ARGUMENT

The Third Circuit read this Court's opinion in *Missouri v. Holland*, 252 U.S. 416 (1920), as standing for the principle that the federal government can

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[1]Counsel of record for the parties received timely notice of the intent to file this brief. Sup. Ct. R. 37.2(a). The parties in this case have consented to the filing of this brief. Copies of the consent letters are being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

bootstrap the scope of its own power simply by negotiating a treaty and then implementing that treaty by statute. Such a theory would nullify the structural limits on federal power in the Constitution.

The Third Circuit also read the chemical weapons statute at issue here as in effect making a federal crime out of any misuse of a chemical, and then categorically held that enormously broad federal statute to be a valid implementation of a treaty under the Necessary and Proper Clause. This holding opens the door to a general federal police power.

This Court should grant review to resolve the important and immensely practical questions this case presents about the Treaty Power, the *Holland* decision, the Necessary and Proper Clause, and the notion of a federal police power.

ARGUMENT

Amicus does not condone petitioner Carol Bond's attempts to injure her husband's paramour by the use of toxic substances. Such acts properly incur criminal liability under state law. The problem here, however, is that the *federal* government asserts the authority to treat Bond's misconduct as violative of a *federal* statute implementing, of all things, a chemical weapons treaty.

The legal theory the Third Circuit adopted to justify this extravagant exercise of federal power is wholly incompatible with any structural limitation on federal powers. This Court should grant review and, after plenary consideration, reverse.

I. THE QUESTION WHETHER *MISSOURI v. HOLLAND* AND THE TREATY POWER AUTHORIZE THE LIMITLESS EXPANSION OF DOMESTIC FEDERAL POWER BY TREATY IS WORTHY OF REVIEW.

The provisions of the Constitution must be read in harmony with each other. Just as it would make no sense to construe the Free Speech Clause (U.S. Const. amend. I) in a way that would negate the Copyright Clause (U.S. Const. art. I, § 8, cl. 8), likewise it would make no sense to construe the Treaty Power (U.S. Const. art. II, § 2, cl. 2) as negating the structural features that pervade the Constitution and create a federal government of only limited powers (*e.g.*, U.S. Const. art. I, § 8; *id.* amend. X). Insofar as the decision below reads *Missouri v. Holland*, 252 U.S. 416 (1920), as creating such a constitutional contradiction, this case strongly merits review.

The Treaty Power cannot be unlimited. If it were, this would negate the remainder of the Constitution. Therefore, the Treaty Power cannot constitutionally authorize entry into an *international* treaty that would aggrandize the *domestic* powers of any branch of the federal government beyond the scope otherwise authorized by the Constitution. For example, a treaty could not confer legislative power on the federal executive; confer one-house veto or pardon power on the Congress; or confer advisory opinion authority on the federal judiciary. For the same reason, a treaty could not abrogate federalism by conferring a general police power on the federal government. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (Roberts, C.J.)

(constitutional powers "must be read carefully to avoid creating a general federal authority akin to the police power").

To be sure, unconstitutional exercises of the Treaty Power as such may not readily be justiciable. Here, for example, the federal government is not prosecuting petitioner Bond directly under the pertinent chemical weapons treaty, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the Convention) (Pet. App. 146). But implementing statutes can, as in this case, produce justiciable cases and controversies. And a constitutional challenge to the implementing statute can place in question the underlying treaty. Indeed, one of the key premises for the Third Circuit's holding in this case is the constitutional validity of the Convention itself. Pet. App. 6-7, 15, 20-26. As the court below noted, the key passage in *Missouri v. Holland*, 252 U.S. at 432, begins with the phrase, "If the treaty is valid . . . ." Thus, review of the validity of legislation implementing a treaty necessarily implicates with the validity of the treaty itself.

As explained above, a treaty could certainly be constitutionally invalid, like the hypothetical treaty conferring legislative power upon the executives of signatory nations. And if it would be unconstitutional to confer general police power upon the federal government by treaty in one fell swoop, it logically must likewise be unconstitutional to confer such power one step at a time. Violations of this latter kind are limited only by the imagination and the willingness of treaty negotiators. Moreover, such violations know no

political boundaries, i.e., they could advance (and correspondingly impair) agendas of any ideological stripe. Thus, nations could agree by treaty universally to require -- or forbid -- each of the following:

- publicly funded education vouchers for private schools;
- parental notice for abortion;
- restrictions on handgun possession near schools or churches;
- various regulatory limits on home businesses, home schools, or personal hobbies.

These are all generally matters of choice for state and local governments. The federal government may not dictate a one-size-fits-all result in either direction. Yet it is certainly conceivable that an Administration of one viewpoint or its opposite could negotiate with a like-minded foreign sovereign to agree to the mutual imposition of nationwide rules -- in either direction -- on these matters.

Of course, the Treaty Power could not authorize affirmative violations of constitutional rights (e.g., a treaty outlawing churches or banning the carrying of placards). But none of the examples listed above entail such violations. Rather, these examples show how an otherwise unlimited Treaty Power would run roughshod over both the constitutional balance between the three federal branches (separation of powers) and the constitutional balance between the state and federal governments (federalism).

The Third Circuit opined that the solution may be to confine the language in *Holland* referring to the

Treaty Power as presupposing that the Treaty Power retained its original meaning, i.e., as limited to such external objects as war, peace, and international commerce. Pet. App. 20-24. So understood, *Holland* would not stand for the proposition that any and all treaties *ipso facto* can validly authorize the expansion of federal power. Rather, only exercises of the Treaty Power *as originally understood* would authorize federal legislation. On this understanding, *Holland*'s broad language would simply not extend to treaties that would dictate domestic matters such as, say, the permissibility of various curricula for public education or, as here, the criminal treatment of poison suspects. The Third Circuit, however, as an inferior federal court, lacked the authority definitely to construe either *Holland* or the Treaty Power. Hence, this Court's review is needed.

II. THE QUESTION WHETHER THE NECESSARY AND PROPER CLAUSE AUTHORIZES THE FEDERAL GOVERNMENT, IN THE NAME OF TREATY IMPLEMENTATION, TO EXERCISE PLENARY POLICE POWER, IS WORTHY OF REVIEW.

The Third Circuit concluded not only that the convention represented a valid exercise of the Treaty Pow[illegible] under *Holland*, but also that the Necessary and Proper Clause authorized the incredibly broad implementing statute at issue here. Pet. App. 33-36. This holding also merits review, as it in effect approves the creation of a general federal police power by treaty.

The statute at issue here is 18 U.S.C. § 229, adopted to implement the Convention. That statute makes it a federal crime to "own, possess, or use . . . any chemical weapon." § 229(a)(1). The statute defines "chemical weapon" to include a "toxic chemical," § 229F(1)(A), which in turn "means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." § 229F(8)(A). Given the immense variety of animals and their varying vulnerability to different chemicals (e.g., salt can kill slugs, borax can kill ants, garlic oil can kill aphids), it is safe to assume that this statute literally prohibits owning, possessing, or using any chemical substance whatsoever, except where a statutory exception applies.[2]

There is in fact an exception, to the definition of chemical weapons, for chemicals intended for "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity, or other activity," § 229F(7)(A), so long as the "type and quantity" is "consistent with such a purpose," § 229F(1)(A). The crucial question of statutory interpretation is whether "purpose" (or "intended") refers to the *objective* purpose of the *substances* or the *subjective* purpose of the *defendant*.

---

[2]In light of the enormous potential breadth of the statute at issue, and its arguable application to virtually every household in America, the question whether a narrowing construction should govern the statute also merits prompt review. *See* Pet. at ii (Question #2).

If the exception is viewed as exempting substances that, objectively, have peaceful purposes and are in quantities consistent with such purposes, then the miscellany of household items in the kitchen, garage, and medicine cabinet fall outside the statute -- but so do the chemicals Mrs. Bond used, which were presumably part of the regular materials the Rohm and Haas chemical company maintained for its peaceful purposes. Pet. App. 3.

But if, on the other hand, a non-peaceful subjective purpose for the particular use by the defendant negates the exemption, then if a malicious purpose took Mrs. Bond outside the statute, such a purpose would also make a federal criminal out of everyone who deliberately misuses chemicals. Adding salt to another person's drink to spoil it, even as a gag, would be federal criminal use of a chemical weapon. Ditto for putting graffiti on a wall (paint is a "toxic substance" to some creatures, including presumably some tiny ones living on the surface being painted), poisoning a neighbor's annoying dog, and tinting purple the hair of a sleeping college roommate. These are wrongful acts of varying severity, the bread and butter of state and local criminal law. But the decision below embraces *federal* authority to proscribe all misconduct using chemicals of any kind.

The rationale of the Third Circuit was that this extraordinary expansion of federal criminal power was "necessary and proper" to implement the Treaty

Power[3] as exercised in the Convention. Pet. App. 33-36. This case therefore presents the question of whether a comprehensive federal ban on "misuse of a chemical" is both necessary and proper to implement a treaty against chemical weapons. In particular, this case asks whether it is "proper" to enlarge federal domestic powers beyond previous bounds in order to comply with an international treaty and "necessary" to go so dramatically beyond the treaty's focus on stockpiling chemical weapons.

Ultimately, resolution of this issue will determine whether the powers of the federal government are indeed "limited" under our Constitution, or if instead the structural limits on federal power can be negotiated away through agreements with foreign sovereigns. These weighty concerns go to the heart of liberty in America. "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011) (internal quotation marks and citations omitted).

This Court should grant review.

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[3]The lower court did not address the federal government's abandoned, and later belatedly proposed, alternative defense under the Commerce Clause, Pet. App. 4 n.1, 27 n.14, and that argument is not before this Court. It bears mention that in any event the implementing statute does not contain any "jurisdictional hook" that might limit its scope to matters of interstate commerce. The statute thus treats salt, vinegar, and every other chemical substance as if it were contraband subject to comprehensive federal regulation. *Cf. Gonzales v. Raich*, 545 U.S. 1 (2005).

CONCLUSION

The decision below embraces a formula for negotiating away, by treaty, any and all structural limits upon federal authority. This Court should grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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September 4, 2012

AMICUS CURIAE BRIEF

No. 12-158

In the

Supreme Court of the United States

CAROL ANNE BOND, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* CATO INSTITUTE AND CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Can the President increase Congress's legislative power by entering into a treaty?

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Printz v. United States,
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Reid v. Covert,
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United States v. Bond,
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United States v. Bond,
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Ware v. Hylton,
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Youngstown Sheet & Tube Co. v. Sawyer,
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Statutes and Constitutional Provisions

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U.S. Const. art. I, § 1 ..... 9, 19

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U.S. Const. art. II, § 2, cl. 2 14

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U.S. Const. art. III, § 1 9-10

U.S. Const. art. III, § 2, cl. 1 19

U.S. Const. art. V 14

U.S. Const. amend. XIII, § 2 14

U.S. Const. amend. XIV, § 5 14

U.S. Const. amend. XV, § 2 14

U.S. Const. amend. XIX, cl. 2 14

U.S. Const. amend. XXIII, § 2 14

U.S. Const. amend. XXIV, § 2 14

U.S. Const. amend. XXVI, § 2 14

Other Authorities

Annals of Cong. (1796) 6

Amar, Akhil Reed, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987) 12

Blackstone, William, *Commentaries* 6, 12

Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, (photo. reprint 1991) (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748) 13

The Declaration of Independence (U.S. 1776) 18

Eastman, John C., *Will Mrs. Bond Topple* Missouri v. Holland*?*, 2010-11 Cato Sup. Ct. Rev. 185 (2011) 21

Farrand, Max, *The Records of the Convention of 1787* (rev. ed. 1966) 19-20

The Federalist (Clinton Rossiter ed., 1961) 13, 22

Golove, David M., *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) 22

Henkin, Louis, *Foreign Affairs and the United States Constitution* (2d ed. 1996) 17-18

Jefferson, Thomas, First Inaugural Address (Mar. 4. 1801), *in* Thomas Jefferson, *Writings* 1136-39 (Merrill D. Peterson, ed.) 22

Johnson, Samuel, *A Dictionary of the English Language* (London, W. Strahan et al., 4th ed. 1773) 10-11

Restatement (Third) of the Foreign Relations Law of the United States (1987) 8

Rosenkranz, Nicholas Quinn, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005) 4, 5, 19, 23

Tribe, Laurence H., *American Constitutional Law* (3d ed. 2000) 8, 14

Tucker, Henry St. George, *Limitations on the Treaty-Making Power* (1915) 13

Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty, 20 Op. Off. Legal Counsel 389 (1996) 17

Washington, George, Farewell Address (Sept. 17, 1796), *in* Presidential Documents 18 (J.F. Watts & Fred L. Israel eds., 2000) 22

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. The Center and its affiliated attorneys have participated as *amicus curiae* or on behalf of parties in many cases addressing the constitutional limits on federal power.

The present case concerns *amici* because it represents an opportunity to clarify that Congress's power is limited by the Constitution and may not be increased by treaty.

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[1] Pursuant to this Court's Rule 37.3(a), all parties consented to the filing of this brief and were given timely notice of intent to file. Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in any manner, and no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

In *Missouri v. Holland*, 252 U.S. 416 (1920), this Court seemed to say that if a treaty commits the United States to enact some legislation, then Congress automatically obtains the power to enact that legislation, even if it would otherwise lack such power. It seemed to say, in other words, that Congress's powers are not constitutionally fixed, but rather may be expanded by treaty.

Justice Holmes provided neither reasoning nor citation for this proposition. It appears in one conclusory sentence, in a five-page opinion that is primarily dedicated to a different question. And this Court has never elaborated. The most influential argument on the point, which has largely short-circuited jurisprudential debate, appears not in the *United States Reports* but in the leading foreign affairs treatise. And recent scholarship has shown that the historical premise of this academic argument is simply, demonstrably false.

The proposition that treaties can increase the power of Congress is inconsistent with the text of the Treaty Clause, the Necessary and Proper Clause, and the Tenth Amendment. It is inconsistent with the fundamental structural principle that "[t]he powers of the legislature are defined, and limited." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). It implies, insidiously, that the President and the Senate can increase their own power by treaty. And it implies, bizarrely, that the President alone—or a foreign government alone—can decrease Congress's power and render statutes unconstitutional. Finally, it creates a doubly perverse incentive: an in-

centive to enter into entangling alliances simply to increase legislative power.

Holland is wrong and should be overruled. This Court should grant certiorari, and it should hold that treaties cannot vest Congress with additional legislative power.

ARGUMENT

I. THIS COURT SHOULD GRANT CERTIORARI TO RECONSIDER AN IMPORTANT AND ERRONEOUS PRECEDENT

In the court below, the Third Circuit held that the Chemical Weapons Convention increased the power of Congress. It held, in other words, that Congress is not limited to those powers enumerated in the Constitution; rather, those powers may be increased by treaty. The Third Circuit felt bound to reach this conclusion by a single, conclusory sentence in *Holland*: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Holland*, 252 U.S. at 432.

But the Third Circuit was obviously uneasy with this conclusion: "[W]ith practically no qualifying language in *Holland* to turn to, we are bound to take at face value" that single sentence. *United States v. Bond*, 681 F.3d 149, 162 (3d Cir. 2012). "[I]t may be that there is more to say about the uncompromising language used in *Holland* than we are able to say, but that very direct language demands from us a di-

rect acknowledgement of its meaning, even if the result may be viewed as simplistic. If there is nuance that has escaped us, it is for the Supreme Court to elucidate." *Id.* at 165 (footnote omitted).

Judge Ambro was even more explicit in concurrence:

> I write separately to urge the Supreme Court to provide a clarifying explanation of its statement in . . . *Holland* . . . . I hope that the Supreme Court will soon flesh out '[t]he most important sentence in the most important case about the constitutional law of foreign affairs,' and, doing so, clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it.

Id. at 169-70 (Ambro, J., concurring) (quoting Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867, 1868 (2005)).

Admittedly, there may not be a *sharp* circuit split on this question—but, if so, that is only because no such split can arise given that one errant sentence from *Holland*. Indeed, a sharp split is improbable when all circuit courts are bound by this "very direct" and "uncompromising" language. *Id.* at 164. The closest thing to a sharp circuit split under these circumstances is exactly what is presented here: circuit judges following *Holland*, but with palpable reluctance—decrying its "simplistic" results, and "urg[ing this] . . . Court to provide a clarifying explanation." *Id.* at 169 (Ambro, J., concurring).

This Court should grant certiorari because that one conclusory sentence from *Holland* is of great theoretical and practical importance, and it is in deep tension with the fundamental constitutional principle of limited and enumerated legislative powers. This Court should clarify that treaties cannot vest Congress with new legislative power.

II. TREATIES CANNOT INCREASE CONGRESS'S LEGISLATIVE POWER[2]

A. The President Cannot, by Entering into a Treaty, Thereby Increase Congress's Power under the Necessary and Proper Clause

As this Court explained when it first encountered this case, the "ultimate issue" here turns on the conjunction of the Necessary and Proper Clause and the Treaty Clause. *United States v. Bond*, 131 S. Ct. 2355, 2367 (2011). Indeed, this much is implicit in *Holland*, although Justice Holmes did not quote either clause, let alone discuss how they fit together. Here, then, is the way that these two clauses fit together as a matter of grammar:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . [the President's] Power, by and with the Advice and Consent of the Senate, to make Treaties.

U.S. Const. art. I, § 8, art. II, § 2.

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[2] The arguments that follow are developed more comprehensively in Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005).

When the two clauses are properly conjoined, it becomes clear that the key term is the infinitive verb "to make." This power is emphatically not the power to make laws for carrying into execution "all treaties." Rather, what may be carried into execution is the "Power . . . *to make* Treaties."

This power would certainly extend to laws appropriating money for the negotiation of treaties. As Rep. James Hillhouse explained in 1796, "the President has the power of sending Ambassadors ... to foreign nations to negotiate Treaties, . . . [but] if no money is appropriated for that purpose, he cannot exercise the power." 5 Annals of Cong. 673-74 (1796).

But on the plain text of the conjoined clauses, the object itself is limited to the "Power . . . to *make* Treaties" in the first place. This is not the power to *implement* treaties already made.

Nor will it do to say that the phrase "make Treaties" is a term of art meaning "conclude treaties with foreign nations and then give them domestic legal effect." There is no indication that that the phrase "make Treaties" ever had such a meaning. British treaties at the time of the Framing were non-self-executing, requiring an act of Parliament to create enforceable domestic law, see, e.g., *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 274 (1796), and yet Blackstone wrote simply of "the *king's* prerogative *to make treaties,*" without any suggestion that Parliament had a role in the "making." 1 William Blackstone, *Commentaries* *249 (emphases added); *see also id.* at *243 ("[T]he king . . . may *make* what treaties . . . he pleases." (emphasis added)); *id.* at *244 ("[T]he king may *make* a treaty." (emphasis added)). Blackstone understood the difference between *making* a treaty,

which the King could do, and giving it domestic legal effect, which required an act of Parliament. The "Power . . . to make Treaties" is exhausted once a treaty is ratified; implementation is something else altogether.

This Court saw that textual point clearly when construing a statute with similar language, to wit, the "right . . . to make . . . contracts." 42 U.S.C. § 1981 (1988) (current version at 42 U.S.C. § 1981(a) (2006)). This statutory "right . . . to make . . . contracts" is textually and conceptually parallel to the constitutional "Power . . . to make Treaties" both because of the key infinitive verb "to make" and because, as Chief Justice Marshall explained, a non-self-executing treaty is itself in the nature of a contract. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("[W]hen the terms of the stipulation import a contract, ... the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the Court."). This Court explained:

> [T]he right to *make* contracts does not extend, as a matter of either logic or semantics, to conduct . . . *after* the contract relation has been established, including breach of the terms of the contract . . . . Such *postformation* conduct does not involve the right to *make* a contract, but rather implicates the *performance* of established contract obligations . . . .

Patterson v. McLean Credit Union, 491 U.S. 164, 177 (1989) (emphases added). Just so here. The "Power . . . to make Treaties" does not extend, as a matter of logic or semantics, to the implementation of treaties already made.

The title of the present statute suffices to finish the point. The "Chemical Weapons Convention Implementation Act" *implements* a treaty; it is neither necessary nor proper to *make* any treaty.

B. Congress's Legislative Power Can Be Increased Only by Constitutional Amendment, Not by Treaty

Under *Holland,* some statutes are beyond Congress's power to enact absent a treaty, but within Congress's power given a treaty. This implication runs counter to the textual and structural logic of the Constitution, because it means that Congress's powers are not constitutionally fixed. See 1 Laurence H. Tribe, *American Constitutional Law*, § 4-4, 645-46 (3d ed. 2000) ("By negotiating a treaty and obtaining the requisite consent of the Senate, the President . . . may endow Congress with a source of legislative authority independent of the powers enumerated in Article I."). If so, the legislative power is not limited to the subjects enumerated in the Constitution; it can extend to all of those subjects, plus any others that may be addressed by treaty. And the conventional wisdom has it that there are no subject-matter limitations on the scope of the treaty power. See Restatement (Third) of the Foreign Relations Law of the United States, § 302 cmt. c.

If this is so, then the legislative powers are not merely *somewhat* expandable by treaty; they are expandable *virtually without limit.* In theory, the President might, ostensibly to foster better relations with another country, simply exchange reciprocal promises to regulate the citizenry so as to maximize the collective welfare. If *Holland* means what it says,

then such a treaty would confer upon Congress plenary legislative power.

That proposition is in deep tension with the basic constitutional scheme of enumerated powers; it is inconsistent with the Tenth Amendment's premise of reserved powers; and it stands contradicted by countless canonical statements that Congress's powers are fixed and defined. It is axiomatic that "the Constitution[] confer[s] upon Congress . . . not all governmental powers, but only discrete, enumerated ones." *Printz v. United States*, 521 U.S. 898, 919 (1997). In Chief Justice Marshall's words: "The powers of the legislature are *defined, and limited;* and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury*, 5 U.S. (1 Cranch) at 176 (emphasis added). Indeed, in this very case, this Court explained: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct. at 2364. This would be no protection at all if the legislative power were expandable by treaty. All of these propositions, from *Marbury* to *Bond*, are flatly inconsistent with *Holland*.

1. Congress only possesses the "legislative powers herein granted."

Chief Justice Marshall's view is reinforced by the juxtaposition of the three Vesting Clauses. Article I, Section 1, provides: "*All* legislative Powers *herein granted* shall be vested in a Congress ...." U.S. Const. art. I, § 1 (emphases added). By contrast, Article II, Section 1, provides that "*[t]he* executive Power shall be vested in a President ...," U.S. Const. art. II, § 1 (emphasis added), and Article III, Section 1, provides

that "*[t]he* judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," U.S. Const. art. III, § 1 (emphasis added).

There is a simple explanation for this difference in the Vesting Clauses. Congress is the first mover in the mechanism of U.S. law. It "*make[s]* . . . Laws." U.S. Const. art. I, § 8, cl. 18 (emphasis added). By contrast, the executive branch subsequently "execute[s]" the laws made by Congress, *see* U.S. Const. art. II, § 3, and the judicial branch interprets those laws. The scope of the executive and judicial power, therefore, is *contingent* on acts of Congress.

For example, the Constitution provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. By passing a new statute, Congress expands the President's powers by giving him a new law to execute. As Justice Jackson explained, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right *plus all that Congress can delegate*." *Youngstown Sheet & Tube Co. v. Sawyer* (*Steel Seizure*), 343 U.S. 579, 635 (1952) (Jackson, J., concurring) (emphasis added).

Likewise, the judicial power is also contingent—indeed, it is expressly contingent, not only on statutes but also on treaties. Article III provides that the judicial power shall "extend" to certain sorts of cases and controversies. See U.S. Const. art. III, § 2, cl. 1. The verb "to extend" suggests today just what it signified in 1789: stretching, enlarging. *See, e.g.*, Samuel Johnson, *A Dictionary of the English Language*

(London, W. Strahan et al., 4th ed. 1773) ("To EXTEND . . . 1. *To stretch out* towards any part. . . . 5. *To enlarge;* to continue. . . . 6. To encrease in force or duration. . . . 7. To enlarge the comprehension of any position. . . . 9. To seize by a course of law." (emphases added)). And, in particular, "[t]he judicial Power shall *extend* to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *and Treaties made, or which shall be made, under their Authority*." *Id.* (emphases added). This clause expressly provides that the scope of the judicial power may be expanded by treaty. A new (self-executing) treaty, like a new statute, can give the judiciary something new to do, thus expanding its jurisdiction. So it would not have made sense to limit the federal courts to the powers "herein granted," because the scope of the judicial power may be expanded, not only by statute but also by treaty.

But Article I has no such provision. The legislative power does not "extend . . . to Treaties made, or which shall be made." *Id.* Indeed, the legislative power does not "extend" at all. Rather, the only legislative powers provided for in the Constitution are those that it enumerates, those that it says are "herein granted." The scope of the legislative power—unlike the scope of the executive and judicial powers—does not change with the passage of statutes or the ratification of treaties. The legislative power alone is fixed rather than contingent, and so it alone is limited to an enumeration of powers "herein granted."

Indeed, this structural fact, reflected in the textual dichotomy between Article I and Articles II and III, coheres perfectly with the underlying theory of

separation of powers. To create a tripartite government of limited powers, it is logically necessary that at least one of the branches have fixed powers—powers that cannot be increased by the other branches. As one would expect, that branch is Congress. Congress is the first branch of government, the first mover in American law, the fixed star of constitutional power. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 n.71 (1987) ("Congress remained in many ways *primus inter pares*. Schematically, Article I precedes Articles II and III. Structurally, Congress must exercise the legislative power before the executive and judicial powers have a statute on which to act." (internal citations omitted)). Congress, when acting pursuant to its own delegated powers, can increase the power of the President, *but the President cannot increase the power of Congress in return*. If he could, the federal government as a whole would cease to be one of limited power.

Moreover, to the extent that the jurisdiction of any branch may increase, it is naturally left to a *different* branch to work the expansion. To entrust Congress to expand the subject-matter jurisdiction of the executive and the judiciary is consistent with the theories of Montesquieu and Madison, because Congress has no incentive to overextend the powers of the other branches at its own expense. *See* Blackstone, *supra*, at *142 ("[W]here the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of [its] own independence, and therewith of the liberty of the subject."). But it is quite another matter to entrust treatymakers—the President and Senate—to expand

the subject-matter jurisdiction of lawmakers—the President, Senate, and House. Here, there is no ambition to counteract ambition; instead, ambition is handed the keys to power. See Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* bk. XI, ch. IV, at 161 (photo. reprint 1991) (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748) ("[E]very man invested with power is apt to abuse it, and to carry his authority as far as it will go."); see also *INS v. Chadha*, 462 U.S. 919, 947 (1983) (noting "the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed"); *The Federalist No. 49*, at 313-14 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments."). As Henry St. George Tucker wrote in his treatise on the treaty power five years before *Holland*, "[s]uch interpretation would clothe Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power." Henry St. George Tucker, *Limitations on the Treaty-Making Power* § 113, at 130 (1915).

The Court realized this long before *Holland*, in a case that Justice Holmes failed to cite. As the Court explained in 1836: "The government of the United States . . . is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, *nor can it be enlarged under the treaty-making power.*" *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836) (emphasis added).

2. *Holland* enables the circumvention of Article V.

Another way to put the point is that *Holland* permits evasion of Article V's constitutional amendment mechanism. As a general rule, the subject matter of the legislative power can be increased only by constitutional amendment. This expansion has happened several times. *See* U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2; amend. XIX, cl. 2; amend. XXIII, § 2; amend. XXIV, § 2; amend. XXVI, § 2.

The process provided by the Constitution for its own amendment is of course far more elaborate than the process for making treaties. *Compare* U.S. Const. art. II, § 2, cl. 2, *with* U.S. Const. Art. V. But if *Holland* means what it says, then treaties "may endow Congress with a source of legislative authority independent of the powers enumerated in Article I." Tribe, *supra*. In other words, the legislative subject-matter jurisdiction of Congress may be increased not just by constitutional amendment but also by treaty.

This Court rejected an analogous implication in *City of Boerne v. Flores*, 521 U.S. 507 (1997):

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alterable when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities

> could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

Id. at 529 (citations omitted) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

Holland presents the same problem. Read literally, it renders an object of the Necessary and Proper Clause expandable with the ratification of each new treaty. Such an interpretation, in turn, allows the President and Senate to work an expansion of legislative power, which "effectively circumvent[s] the difficult and detailed amendment process contained in Article V." *Id.* But as the plurality explained in *Reid v. Covert*:

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.

Reid v. Covert, 354 U.S. 1, 17 (1957) (plurality).

C. If *Holland* Were Correct, Then the President—or a Foreign Sovereign—Could Decrease Congress's Power and Render U.S. Laws Unconstitutional

If it is strange to think that the legislative power can be *expanded,* not by constitutional amendment, but by an action of the President with the consent of the Senate, it is surely stranger still to think that the legislative power may be *contracted* by the President alone. Yet this too is an implication of *Holland.*

As a general matter, if a statute is constitutional when enacted, it generally can be *rendered* unconstitutional only by a constitutional amendment. In other words, "[a] statute . . . must be tested by powers possessed at the time of its enactment." *Newberry v. United States*, 256 U.S. 232, 254 (1921). See also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) ("The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." (quoting Chief Justice John Marshall, *A Friend of the Constitution*, Alexandria Gazette, July 5, 1819, *reprinted in John Marshall's Defense of McCulloch v. Maryland* 190-191 (Gerald Gunther ed., 1969))).

Yet *Holland* creates an anomalous exception to this rule. It implies that some exercises of legislative power derive their authority not from the Constitution but from specific treaties. If so, then when such treaties are terminated, their implementing statutes presumably *become* unconstitutional. Such statutes are suddenly rendered unconstitutional—not by constitutional amendment but by mere treaty abrogation.

And if it is strange to think of a statute *becoming* unconstitutional, surely it is stranger still to think that the President may render a statute unconstitutional *unilaterally and at his sole discretion*. Yet this is what follows from *Holland*. The Executive Branch takes the position that the President has power to abrogate treaties unilaterally. *See* Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty, 20 Op. O.L.C. 389, 395 n.14 (1996). If so, then the President, by renouncing a treaty, could unilaterally render an implementing act of Congress unconstitutional.

This result is inconsistent with the basic proposition that "repeal of statutes, no less than enactment, must conform with [Article] 1." *Chadha*, 462 U.S. at 954. This Court did not hesitate to strike down a statute that "authorize[d] the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7." *Clinton v. City of New York*, 524 U.S. 417, 445 (1998). As this Court underscored, "[t]here is no provision in the Constitution that authorizes the President . . . to repeal statutes." *Id.* at 438. Yet under *Holland*, legislation that reaches beyond enumerated powers to implement treaties is, in effect, subject to a different rule. Here, in essence, the President has a unilateral power "to effect the repeal of laws, for his own policy reasons." *Id.* at 445. Whenever he chooses, he may abrogate a treaty and thus render any implementing legislation unconstitutional.

And that is not the worst of it. Our treaty partners, too, can renounce treaties. *See* Louis Henkin, *Foreign Affairs and the United States Constitution*

204 (2d ed. 1996) ("[A treaty] is not law of the land if it . . . has been terminated or destroyed by breach (whether by the United States *or by the other party or parties*).") (emphasis added). Under *Holland*, therefore, it is not only the President who can, at his own discretion, render certain statutes unconstitutional by renouncing treaties. *Foreign sovereigns can do this too.* Surely the Founders would have been surprised to learn that a federal statute—duly enacted by both Houses of Congress and signed by the President—may, under some circumstances, be rendered unconstitutional at the discretion of, for example, the King of England. After all, ending the King's capricious control over American legislation was the first reason given on July 4, 1776, for the Revolution. *See* The Declaration of Independence paras. 2-4 (U.S. 1776). Yet this too is a consequence of *Holland*.

All these paradoxes can be resolved only if Congress's legislative power cannot be expanded or contracted by treaty.

III. THE MOST INFLUENTIAL ARGUMENT SUPPORTING *HOLLAND* IS BASED ON A MISREADING OF CONSTITUTIONAL HISTORY

Justice Holmes set forth no arguments whatsoever for the proposition that treaties can increase Congress's legislative power. And subsequent scholars and courts have generally contented themselves with a citation to *Holland*. But one eminent scholar has presented a single substantive argument in support of this proposition, based upon the drafting history of the Constitution.

As discussed above, the legislative power, unlike the judicial power, does not expressly "extend to . . . Treaties made, or which shall be made." U.S. Const. art. III, § 2, cl. 1. Rather, the legislative power is limited by the Constitution to those powers that it enumerates—those that are "herein granted." U.S. Const. art. I, § 1. To this textual point, though, Professor Louis Henkin has an apparently devastating reply based on constitutional drafting history: *"The 'necessary and proper' clause originally contained expressly the power 'to enforce treaties' but it was stricken as superfluous."* Henkin, *supra*, at 481 n.111 (emphasis added).

On this drafting history, it would certainly appear that the Necessary and Proper Clause—in its final form, without those crucial words—still subsumes the power "to enforce treaties" beyond the other enumerated powers. And so, unsurprisingly, this argument has proven quite influential. Indeed, when this Court invoked *Holland* eight years ago, it cited Henkin's treatise. *United States v. Lara*, 541 U.S. 193, 201 (2004). Likewise, in this very case, the Government relied on exactly this argument, quoting the crucial historical analysis of Professor Henkin. Government's Resp. to Mot. To Dismiss Counts One and Two of the Indictment 7-8.

But Professor Henkin was wrong. As recent scholarship has demonstrated, he simply misread the constitutional history. *The words "to enforce treaties" never appeared in any draft of the Necessary and Proper Clause.* They were never struck as superfluous because they were never part of that Clause. *See* Rosenkranz, *supra*, at 1912-18; *The Records of the*

Federal Convention of 1787, at 323, 382 (Max Farrand ed., rev. ed. 1937).

In short, the only historical argument in favor of *Holland* is based on a premise that is simply, demonstrably false.

IV. *HOLLAND* IS A STRUCTURAL AND DOCTRINAL ANAMOLY

A. *Holland* Is in Tension with *Reid*

If treaties cannot confer legislative power, then a treaty might commit the United States to enact legislation even though Congress would have no power to fulfill the promise.

At first glance, this might seem an anomalous result, but the truth is that this result already obtains from *Reid*. Under current doctrine, the President may, by non-self-executing treaty, promise that Congress will violate the Bill of Rights. Such a treaty would not itself violate the Constitution, because a non-self-executing treaty has no domestic legal effect. Nevertheless, it certainly does not follow that Congress is thereby empowered to violate the Bill of Rights. *Reid*, 354 U.S. at 16-17 (plurality opinion). It is already true, therefore, that the President may make political promises by treaty that Congress lacks the legal power to keep (absent a constitutional amendment).

> [T]he Government contends that [the statute at issue] can be sustained as legislation which is necessary and proper to carry out ... international agreements .... The obvious and decisive answer to this, of course, is that no

> agreement with a foreign nation can *confer power on the Congress*, or on any other branch of Government, *which is free from the restraints of the Constitution*.

Id. at 16 (plurality) (emphases added).

Reid is right, and it is *Holland* that creates the anomaly. Under *Reid*, the President has theoretical power to enter into a treaty promising that Congress will violate the Bill of Rights—but such a treaty does not and cannot empower Congress to do so. Likewise, the President has theoretical power to enter into a treaty promising that Congress will exceed its legislative powers—but again, *contra Holland*, the treaty does not and cannot empower Congress to do so. *See* John C. Eastman, *Will Mrs. Bond Topple* Missouri v. Holland*?*, 2010-11 Cato Sup. Ct. Rev. 185, 194-202 (2011).

B. *Holland* Creates Doubly Perverse Incentives—Incentives for More International Entanglements, Which in Turn Increase Legislative Power

It might be argued that the rule of *Holland* allows desirable flexibility in the conduct of foreign affairs. But the flexibility afforded by the rule is entirely insidious.

The domestic flexibility afforded by treaties that reach beyond enumerated powers will of course be tempting to the President and the Senate. After all, they, plus the House of Representatives, will be the beneficiaries of the increased legislative power. Indeed, this prospect constitutes a powerfully perverse

incentive to enter into treaties that go beyond enumerated powers. This is just the sort of self-aggrandizing "flexibility" that the Constitution was designed to prohibit. *See The Federalist No. 49*, at 313-14 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments.").

The Constitution should not be construed to create this doubly perverse incentive—an incentive to enter "entangling alliances," merely to attain the desired side effect of increased legislative power. *See* Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* Writings 1136-39 (Merrill D. Peterson, ed. 1984) (calling for "peace, commerce, and honest friendship with all nations, entangling alliances with none"); *see also* George Washington, Farewell Address (Sept. 17, 1796), *in* Presidential Documents 18, 24 (J.F. Watts & Fred L. Israel eds., 2000) ("It is our policy to steer clear of permanent alliances with any portion of the foreign world . . . ."). Indeed, the treaty-makers apparently succumbed to just this temptation in *Holland* itself: "If ever the federal government could be charged with bad faith in making a treaty, this had to be the case." David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1256 (2000). The Constitution should not be interpreted to create a doubly perverse incentive to indulge this sort of bad faith.

C. *Holland* Should Not Be Sustained on *Stare Decisis* Grounds

At first glance, *Holland* might appear to present a strong case for application of *stare decisis*. It is 92 years old. It was written by Justice Holmes. And it is canonical.

But the argument for *stare decisis* is not nearly as compelling as it may first appear. The opinion may be canonical, but on the point at issue—Congress's power to legislate pursuant to treaty—it is also utterly unreasoned. The *stare decisis* force of an opinion turns, in part, on the quality of its reasoning and diminishes substantially if it provides no reasoning at all. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("[W]hen governing decisions are . . . badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

This Court has not hesitated to reconsider a canonical opinion when new scholarship in the *Harvard Law Review* demonstrates that the conventional historical account was simply wrong. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72-73 n.5 (1938) (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 51-52, 81-88, 108 (1923)). And it has not hesitated to overrule such an opinion when it becomes clear that the opinion is fundamentally inconsistent with constitutional structure. *Erie*, 304 U.S. at 77 (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)). This is just such a case. *See* Rosenkranz, *supra*.

In short, *Holland* may be canonical, but it does not present a strong case for *stare decisis*. It was wrongly decided and should be overruled.

CONCLUSION

A treaty cannot confer new power on Congress, and so the treaty at issue here did not empower Congress to enact 18 U.S.C. § 229. This Court should grant a writ of certiorari and then reverse the Third Circuit's judgment.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-158

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In The
Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF YALE LAW SCHOOL CENTER FOR GLOBAL LEGAL CHALLENGES AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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De Geofroy v. *Riggs*, 133 U.S. 258 (1890) 10, 11, 18

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Missouri v. *Holland*, 252 U.S. 416 (1920) ..... *passim*

Neely v. *Henkel*, 180 U.S. 109 (1901) 9, 10

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United States v. *Five Gambling Devices*, 346 U.S. 441 (1953) 15

United States v. *Lara*, 541 U.S. 193 (2004) 10

Whitney v. *Robertson*, 124 U.S. 190 (1888) 8

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CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I ..... *passim*

U.S. Const. Art. II ..... *passim*

U.S. Const. Art. III 5

U.S. Const. Art. VI 5

TREATIES

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Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45 ..... 11, 12

International Convention on the Elimination of All Forms of Racial Discrimination, June 21, 1994, S. Treaty Doc. No. 95-18 23

International Covenant on Civil and Political Rights, Apr. 2, 1992, S. Treaty Doc. No. 95-20 23

Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 24

TABLE OF AUTHORITIES – Continued

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United Nations Treaty Collection, *United Nations Convention to Combat Desertification*, http://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XXVII-10&chapter=27&lang=en#EndDec 24

OTHER AUTHORITIES

Akhil Amar, *America's Constitution: A Biography* (2005) 6

Christian L. Wiktor, *Treaties Submitted to the United States Senate: Legislative History, 1989-2004* (2006) 22

Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399 (2000) 23

David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) 6, 13

Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* (1988) 15

Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. Cal. L. Rev. 1327 (2006) 22, 25

Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 Duke L.J. 1127 (2000) 6, 8

TABLE OF AUTHORITIES – Continued

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Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties*, 73 Mo. L. Rev. 1063 (2008).....25

Letter of Transmittal, UN Convention on the Rights of Persons with Disabilities, S. Treaty Doc. No. 112-7 (2012), http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc7/pdf/CDOC-112tdoc7.pdf.....24

Library of Cong., *THOMAS: Treaties*, http://thomas.loc.gov/home/treaties/treaties.html.....22

Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 Wayne L. Rev. 841 (2001).....17

Oona A. Hathaway et al., *The Treaty Power: Its History, Scope and Limits*, 98 Cornell L. Rev. (forthcoming 2013), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155179 .....*passim*

Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236 (2008).....*passim*

S.J. Res. 130, 82nd Cong. (1952).....15

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The Federalist No. 22 (Alexander Hamilton) (Clinton Rossiter ed., 1961).....7

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The Records of the Federal Convention of 1787 (Max Farrand ed., 1937) 14

Thomas Jefferson, *A Manual of Parliamentary Practice: For the Use of the Senate of the United States* (1812), reprinted in *Jefferson's Parliamentary Writings* 353 (Wilbur S. Howell ed., 1988) 16

U.S. Senate, *Treaties Approved by the Senate During The Current Congress* (Sept. 26, 2011), http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/trty_rtf.htm 21

INTEREST OF THE *AMICUS CURIAE*

The Yale Law School Center for Global Legal Challenges is an independent Center that promotes the understanding of international law, national security law, and foreign relations law.[1] The Center aims to close the divide between the legal academy and legal practice by connecting the legal academy to U.S. government actors responsible for addressing international legal challenges. In the process, the Center aims to promote greater understanding of legal issues of global importance – encouraging the legal academy to better grasp the real legal challenges faced by U.S. government actors and encouraging those same government actors to draw upon the expertise available within the legal academy. The Center files this brief to promote accurate interpretation of U.S. foreign relations law in this case.

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[1] Pursuant to Rule 37 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties' correspondence consenting to the filing of this brief has been filed with the Clerk's office. The views expressed in this brief are not necessarily those of the Yale Law School or Yale University.

SUMMARY OF ARGUMENT

The Framers crafted a Constitution to enable the United States to act as one nation on the global stage. The Constitution's multiple treaty-related clauses were shaped by the Framers' experience with a failed treaty regime under the Articles of Confederation – a failure due mostly to the resistance of individual States to national treaty commitments undertaken during the Confederation. The Framers responded by empowering the President to make treaties with the advice and consent of the Senate and by endowing Congress with authority to make all laws necessary and proper to carry out the treaty power. In addition, the Framers ordained treaties as the supreme law of the land. In light of this history, this Court has rightly affirmed Congress's authority to ensure the effectiveness of our international treaty obligations over the objections of States. See, *e.g.*, *Missouri* v. *Holland*, 252 U.S. 416 (1920).

The Framers were not inattentive to federalism concerns or unaware that the treaty power could be abused. Indeed, they crafted structural, political, and diplomatic checks precisely to address these concerns. The Constitution's requirement that two-thirds of the Senate advise and consent to a treaty gives the power to a minority of States to prevent ratification of a treaty. The President and Senate, moreover, are subject to discipline at the polls if they use the treaty power to inappropriately expand their power vis-à-vis the States. The United States must also secure the consent of a foreign government to any treaty, thus

adding a diplomatic check to the Constitution's structural and political checks. Finally, it has long been accepted that treaties may not contravene individual rights.

These checks have proven remarkably effective. Traditional Article II treaties of the type at issue in this case are a vanishing breed of lawmaking. During the 112th Congress, the United States has ratified only two Article II treaties. In the previous 13 years, the United States ratified an average of about 15 Article II treaties per year. The vast majority of these treaties required no new implementing legislation. Indeed, congressional-executive agreements have largely displaced traditional Article II treaties over the course of the last seventy years. These congressional-executive agreements do not pose the concern raised by petitioner in this case, because they are limited to the enumerated lawmaking authority of Congress under Article I.

Although the legal issue here is admittedly of considerable academic interest, it is of little continuing real-world importance. The Court should deny the petition for certiorari.

ARGUMENT

I. IT IS LONG-SETTLED THAT THE TREATY POWER PERMITS THE FEDERAL GOVERNMENT TO MAKE AND ENFORCE TREATIES ON MATTERS BEYOND THE ENUMERATED POWERS OF CONGRESS IN ARTICLE I.

Against a troubled history of treaty compliance under the Articles of Confederation, the Framers included multiple provisions in the Constitution to enable the national government to engage in a unified and effective foreign policy. The Framers removed the power to make treaties from the States and granted a unified treaty power to the federal government. They ensured that this power would be effective by granting Congress the authority to implement treaties to the full extent of the national government's treaty power.

A. The Constitution Creates a Unified and Effective Treaty Power.

The Constitution endows our national government with comprehensive authority to make and enforce international treaties. It begins in Article I by removing the power to conclude treaties from the States. It provides that "[n]o State shall enter into any Treaty, Alliance, or Confederation," U.S. Const. Art. I, § 10, Cl. 1, and "[n]o State shall, without the Consent of the Congress * * * enter into any Agreement or Compact with another State, or with a foreign

Power," *id.* Art. I, § 10, Cl. 3. It then grants the entire power to conclude treaties to the President by and with the advice and consent of two-thirds of the Senate. *Id.* Art. II, § 2, Cl. 2. To ensure this power will be effective – and that the courts will enforce the obligations even against contrary state law – the Constitution gives the federal courts "judicial power" over "all Cases * * * arising under * * * treaties made," *id.* Art. III, § 2, Cl. 1, and declares that treaties – like the Constitution and other federal laws – "shall be the supreme Law of the Land," *id.* Art. VI, Cl. 2.

Together, the Constitution's multiple and interlocking provisions regarding treaties promote national sovereignty by giving the U.S. government the authority to engage in a unified and effective foreign policy. This was a deliberate choice. The Framers recognized that only a treaty power that was unified and that encompassed all "external regulations" could ensure the "interest and safety of the community." 3 The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787, at 514-515 (Jonathan Elliot ed., William S. Hein & Co., Inc. 2d ed. 1996) (1891) [hereinafter Debates]. Moreover, they placed the Treaty Clause in Article II, making clear that it was not limited to the enumerated powers of Article I, but instead stood as an independent source of authority.

At the Convention, the Framers refused to accept proposals to limit the scope of the federal government's treaty power. To impose such limits, the

Framers concluded, would risk impeding the federal government's ability to conduct foreign relations. See, *e.g.*, 3 Debates at 363 (quoting Peyton Randolph, who argued that "[t]he various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition"); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1132-1133, 1138, 1145 (2000).

The Framers were keenly aware of the Articles of Confederation's failed treaty-enforcement regime, which had left the country deeply vulnerable. Several States had refused to honor provisions of the Treaty of Paris, which required repayment of debts owed to British creditors. This failure, in turn, led the British to delay withdrawing from forts in the American Northwest, thereby placing the entire country at risk. See Akhil Amar, *America's Constitution: A Biography* 47 (2005) (explaining that "[t]he shirking states did not bear the full cost of their defaults, which put sister states at risk by giving Britain a pretext for further North American interventions"); see also Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 Duke L.J. 1127, 1198-1199 (2000) (stating that the failure to abide by the Treaty of Paris led to the British failure to withdraw militarily).

As Alexander Hamilton observed:

> The treaties of the United States, under the present Constitution [of the Confederation], are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation?

The Federalist No. 22, at 151 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The Framers sought to avoid such self-inflicted wounds by crafting a Constitution that grants the federal government power to enforce treaty obligations even in the face of inconsistent state law. See 3 Debates, *supra*, at 515 (quoting James Madison, who explained that "the supremacy of a treaty" was necessary because otherwise "as far as [state laws] contravene its operation, it cannot be of any effect," which "would bring on the Union the just charge of national perfidy, and involve us in war"). In short, "[t]he treaty powers assigned to the federal government by the Constitution were designed to address specific problems experienced under the Articles of Confederation," and "[t]he clearest problem was that states had

failed to abide by federally negotiated treaties." Swaine, 49 Duke L.J. at 1198.

B. Congress Has Authority to Implement Treaties to the Full Extent of the National Government's Treaty Power.

In light of this historical context for the Constitution's treaty powers, the Framers could not plausibly have intended to bar Congress from implementing treaties by legislation to the full extent of the national government's authority to make such treaties. Indeed, because many treaties are *not* self-executing, the power of Congress to implement treaties by legislation may in some cases be the *only* means to give effect to the nation's treaty obligations. As this Court has made clear, when "'[treaty] stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect.'" *Medellín* v. *Texas*, 552 U.S. 491, 504-506 (2008) (quoting *Whitney* v. *Robertson*, 124 U.S. 190, 194 (1888)).

Petitioner's core argument – that the subject-matter limits of treaty-implementing legislation must be cabined to the scope of Congress's enumerated powers – runs counter to the Framers' intent to empower the national government to make effective treaties. Thus, this Court has long recognized that Congress's authority under the Necessary and Proper Clause "includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with

the advice and consent of the Senate to insert in a treaty with a foreign power." *Neely* v. *Henkel*, 180 U.S. 109, 121 (1901).[2]

In *Missouri* v. *Holland*, 252 U.S. 416 (1920), this Court similarly upheld the authority of Congress to implement in full the national government's treaty power. Confronted with a federal statute that regulated a matter of asserted state concern (bird hunting), the Court nonetheless upheld the statute as a valid exercise of Congress's authority to make effective the terms of an international migratory bird protection treaty. Speaking through Justice Holmes, the Court correctly concluded that "[i]f the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432.

The Court in *Holland* also rejected the argument that "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." *Ibid.* It correctly concluded that

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[2] Amici's misleading Question Presented asks whether "the President [can] increase Congress's legislative power by entering into a treaty." Cato Amicus Br. at i. But framing the question in terms of increasing congressional power only makes sense if one assumes that the Constitution does not already grant Congress the power to implement a valid treaty under the Necessary and Proper Clause. This cart-before-the-horse reading of the Clause flies in the face of the Framers' intent because Congress has always been able to implement valid treaties under the Necessary and Proper Clause.

"[i]t is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could, and it is not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." *Id.* at 433 (citation omitted). See also *De Geofroy* v. *Riggs*, 133 U.S. 258, 266 (1890) (observing that a treaty may extend to "all proper subjects of negotiation between our government and the governments of other nations").

Despite petitioner's effort to portray *Holland* as a rogue or outlier precedent, *Holland* was fully consistent with earlier authority (*De Geofroy* and *Neely*), and this Court has repeatedly reaffirmed *Holland*'s recognition of a broad and unified national treaty power. See *United States* v. *Lara*, 541 U.S. 193, 201 (2004) (explaining that while "[t]he treaty power does not literally authorize Congress to act legislatively, for it is an Article II power authorizing the President, not Congress, 'to make Treaties,'" "treaties made pursuant to that power can authorize Congress to deal with 'matters' with which otherwise 'Congress could not deal'") (quoting *Holland*, 252 U.S. at 433); *Santovincenzo* v. *Egan*, 284 U.S. 30, 40 (1931) (noting that the "treatymaking power is broad enough to cover all subjects that properly pertain to our foreign relations" and that "any conflicting law of the state must yield"); *Asakura* v. *City of Seattle*, 265 U.S. 332, 341 (1924) ("The treaty-making power of the United

States is not limited by any express provision of the Constitution, and, though it does not extend 'so far as to authorize what the Constitution forbids,' it does extend to all proper subjects of negotiation between our government and other nations.") (quoting *De Geofroy*, 133 U.S. at 266).[3]

Petitioner challenges only an individual application of the Implementation Act, while refraining from a facial challenge to the Act and conceding that the treaty power allows the federal government to regulate chemical weapons. Pet. at 26. Indeed, the Chemical Weapons Convention clearly falls squarely within the treaty power even under the most constrained view of the federal government's authority. The Convention is, after all, a multilateral treaty with 188 parties that seeks to "prohibit[ ] and eliminat[e] * * * all types of weapons of mass destruction" by "exclud[ing] completely the possibility of the use of chemical weapons" in any setting. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, pmbl., *opened for signature* Jan. 13, 1993, 1974 U.N.T.S. 45. To that end, the Convention seeks to effect the "complete and effective prohibition of the development, production, acquisition,

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[3] As discussed below, this Court acknowledged in both *Holland* and *De Geofroy* that the treaty power may not transgress the Constitution's individual rights protections. See Subsection II.A.4, *infra*, for more on rights-protecting checks on the treaty power.

stockpiling, retention, transfer and use of chemical weapons." *Ibid.* It thus advances a core national security interest on which national unity is essential.[4] The Implementation Act's substantive provisions mirror almost exactly the text of the Convention. See Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-856. The criminal penalties it imposes are rationally related to the purpose of the treaty as set out in the Convention's Preamble and Article I.[5]

In short, the Framers intended to vest our national government with a broad and unified treaty power and to ensure that the federal government could effectively enforce the nation's international treaty obligations. The courts have long affirmed this understanding of the federal treaty power. The treaty

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[4] Petitioner claims that "[h]ere * * * the federal interest in treaty-compliance is non-existent," Pet. at 26, but addressing the dangers posed by chemical weapons is clearly a "national interest of very nearly the first magnitude," *Holland*, 252 U.S. at 435.

[5] Since the enactment of the Implementation Act in 1998, it appears that federal prosecutors have rarely charged defendants with violations of 18 U.S.C. § 229. A search for "18 U.S.C. s. 229" "18 U.S.C. ss" /5 "229" & DA (AFT 1/1/1998) in the "ALLCASES" database of Westlaw reveals written decisions issued for only 6 unique cases in which the statute has been cited as a charge against a criminal defendant, resulting in 17 total decisions. The apparent infrequency of prosecutions under the statute undermines petitioner's assertion that the Implementing Act signals the federal government's attempt to acquire "a general police power." Pet. at 33.

and implementing law at issue in this case clearly fall squarely within that tradition.

II. THE FRAMERS INSTITUTED MANY CHECKS ON THE TREATY POWER THAT CONTINUE TO EFFECTIVELY PROTECT FEDERALISM VALUES.

The Framers were deeply concerned about protecting the rights of the States as well as individuals against federal overreaching. Indeed, at the debates over the Constitution, some argued against a broad and capacious treaty power for this very reason. See, *e.g.*, Golove, 98 Mich. L. Rev. at 1141-1142, 1147. The Framers ultimately decided to protect the States not by restricting the treaty power to certain enumerated matters, see, *e.g.*, 3 Debates, *supra*, 514-515, but instead through a web of structural, political, and diplomatic checks. The courts have also ensured that treaties do not infringe on individual constitutional rights. These checks are effective, and they make it unnecessary for this Court to intervene to impose new constitutional limitations on the national government's treaty powers.

A. The Constitution Places Structural, Political, Diplomatic, and Rights-Protecting Checks on the Treaty Power.

1. Structural Checks

The Constitution protects federalism by requiring that two-thirds of the Senate consent to a treaty

before the President may ratify it. U.S. Const. Art. II, § 2, Cl. 2. The Framers gave the power to consent to treaties to the Senate precisely because they considered the Senate – in which each State is equally represented – uniquely suited to defend the interests of the States.

James Madison observed in the discussion of the Treaty Clause that "the Senate represented the States alone." 2 The Records of the Federal Convention of 1787, at 392 (Max Farrand ed., 1937). Another Convention delegate argued that "small states would not consent to confederate without an equal voice in the formation of treaties." 4 Debates, *supra*, at 120 (statement of William R. Davie at the North Carolina Ratifying Convention). Similarly, Alexander Hamilton argued that "the senators will constantly be attended with a reflection, that their future existence is absolutely in the power of the states. Will not this form a powerful check?" 2 Debates, *supra*, at 317-318 (statement of Alexander Hamilton at the New York Ratifying Convention).

Treaties that require implementing legislation face an *additional* structural hurdle: The treaty must not only win the consent of two-thirds of the Senate, but the implementing legislation must also pass through both the Senate and the House of Representatives, as well as be subject to a potential presidential veto. Indeed, if congressional enactments are entitled to a

presumption of constitutionality,[6] that presumption ought to apply all the more to instances in which the legislative and executive branches have acted not once, but twice.[7]

2. Political Checks

In addition to the structural checks specific to the Treaty Clause, the federal government's treaty-making is subject to significant political checks –

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[6] Because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people," *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984), the "Court[s] do[ ] and should accord a strong presumption of constitutionality to Acts of Congress. This is not a mere polite gesture. It is a deference due to deliberate judgment by constitutional majorities of the two Houses of Congress that an Act is [constitutional]." *United States* v. *Five Gambling Devices*, 346 U.S. 441, 449 (1953) (plurality opinion).

[7] This check is so powerful that proponents of a series of proposed constitutional amendments in the 1950s, known collectively as the Bricker Amendment, aimed to reduce the scope of the federal government's treaty power by requiring that a treaty that altered or abridged federal or state law could become effective only after Congress passed an act or joint resolution to that effect "and then only to the extent that, Congress shall so provide by act or joint resolution." S.J. Res. 130 § 3, 82nd Cong. (1952) (cited in Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* 222 (1988)). President Eisenhower regarded that Amendment as unduly restrictive of the treaty power; the Amendment was, under his leadership, defeated. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1303 (2008).

most important, re-election. A President who might attempt to abuse the treaty power to expand the federal government's authority at the expense of the States can be disciplined at the polls. Indeed, the Framers made explicit their reliance on the President's nation-wide constituency to keep him in check. George Nicholas of Virginia argued: "The consent of the President is a very great security. He is elected by the people at large. He will not have the local interests which the members of Congress may have. If he deviates from his duty, he is responsible to his constituents." See 3 Debates, *supra*, at 240 (statement of George Nicholas at the Virginia ratifying convention).

Moreover, one-third of the Senate faces reelection every two years. As a consequence, the Senate may be held accountable for any abuse of the treaty power, not through the courts but through the political process. This was, again, by design. James Madison explained that the Senate's biennial turnover meant that a President seeking to abuse the treaty power could not long "seduce a part of the Senate to a participation in his crimes * * * ." *Id.* at 516 (statement of James Madison at the Virginia ratifying convention).

3. Diplomatic Checks

Yet another check on the exercise of the treaty power is the necessity of obtaining the consent of a foreign government treaty partner. As Thomas Jefferson noted, no Article II treaty could exist without the "consent of a foreign nation." Thomas Jefferson, *A*

Manual of Parliamentary Practice: For the Use of the Senate of the United States (1812) § 52, reprinted in *Jefferson's Parliamentary Writings* 353, 420 (Wilbur S. Howell ed., 1988). Implicit in this recognition is the fact that the treaty power is effectively limited to those matters for which the U.S. government can find a willing foreign state partner.

It would be highly unlikely for a foreign state to enter into a treaty whose true purpose was to circumvent the limits imposed on the U.S. federal government's legislative power. Suggestions to the contrary lack any empirical support in centuries of treaty-making practice. See Mark Tushnet, *Federalism and International Human Rights in the New Constitutional Order*, 47 Wayne L. Rev. 841, 862 & n.99 (2001) ("Why would the negotiating partner simply do the U.S. treaty-maker a favor?"). And, indeed, in this case, there is no suggestion that the United States' treaty partners entered into the Convention for any reason other than to secure their mutual interests.

The vast majority of foreign states with whom the United States enters treaties have substantial political limits on their own treaty-making authority. A recent empirical review of the treaty-making process of almost every country in the world concluded that "most states require that international law be made through a simple or absolute majority vote in the legislature." Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1272 (2008).

4. Rights-Protecting Checks

While these structural, political, and diplomatic checks protect against federal encroachment upon the prerogatives of the States, the courts have occasionally intervened to protect individual rights. It has always been clear that under the U.S. Constitution, treaties could not "alienate any great, essential right." 3 Debates, *supra*, at 514. The courts have consistently upheld this principle.

"It would not be contended," this Court wrote in 1890, that the treaty power "extends so far as to authorize what the constitution forbids." *De Geofroy*, 133 U.S. at 267. Treaties may not "contravene any prohibitory words to be found in the Constitution." *Holland*, 252 U.S. at 433. There is an important distinction between the violation of affirmative constitutional guarantees and the violation of "some invisible radiation from the general terms of the Tenth Amendment." *Id.* at 434. The former is firmly prohibited, while the latter does not constrain the treaty power, *id.* at 433-434, because "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier." *Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opinion) (holding that an international

agreement could not override an accused U.S. citizen's constitutional right to trial by jury).*

B. The Existing Checks on the Treaty Power Effectively Protect Federalism.

The empirical record demonstrates the effectiveness of the treaty system the Framers created, because it takes no less than an "extraordinary level of consensus" to conclude a traditional Article II treaty from negotiation through ratification. Hathaway, 117 Yale L.J. at 1312. Today, Article II treaties make up a vanishingly small portion of the international

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* Seizing upon cases in which courts were confronted with intrusions upon individual rights, petitioner mistakenly characterizes the lower courts as "confus[ed]" by the proper scope of the treaty power. Pet. at 17. But the cases petitioner cites all stand for the undisputed proposition – not even at issue in this case – that a treaty may not intrude upon a citizen's individual constitutional rights. In *Charles T. Main Int'l, Inc.* v. *Khuzestan Water & Power Auth.*, 651 F.2d 800, 813 n.20 (1st Cir. 1981), the First Circuit affirmed that "neither the President nor Congress may exercise their powers so as to contravene the protections of the Bill of Rights, even when acting in the sphere of international relations." In *Plaster* v. *United States*, 720 F.2d 340, 348 (4th Cir. 1983), the Fourth Circuit similarly affirmed that "the judiciary has jurisdiction to ensure that the Executive's power to extradite is not being exercised so as to violate individual constitutional rights" under the Due Process Clause. And in *In re Aircrash in Bali, Indonesia on April 22, 1974*, 684 F.2d 1301, 1309 (9th Cir. 1982), the Ninth Circuit concluded that a treaty "must withstand essentially the same tests as would domestic legislation against a claim that it denies rights guaranteed by the Constitution," including the rights of due process, equal protection, and the right to travel.

agreements concluded by the United States (and those that require implementing legislation are still fewer). Moreover, when Article II treaties *are* ratified, the political branches take pains to excise or modify the treaty obligation to accommodate federalism principles. And where advisable, the federal government ordinarily accommodates federalism by tempering its enforcement strategies. By design, all of this federalism accommodation occurs without requiring court involvement, and these trends all point to the *de minimis* practical importance of the Court's intervening to resolve the legal issues in this case.

1. Article II Treaties Make Up a Vanishingly Small Portion of U.S. International Agreements.

Petitioner claims that "the question presented raises an especially important and recurring issue," Pet. at 16, and that "the need to enforce constitutional restraints on the treaty power is all the more pressing" because of a "recent trend[ ]" involving "the expanding scope and number of international treaties." Pet. at 32. Nothing could be further from the truth.

In the modern era, traditional Article II treaties have been almost entirely supplanted by congressional-executive agreements.[9] The number of treaties

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[9] Congressional-executive agreements are authorized by both houses of Congress through the ordinary legislative

(Continued on following page)

approved each year has remained roughly the same since the Founding of the country despite an immense increase in other forms of international lawmaking beginning in the 1940s. Hathaway, 117 Yale L.J. at 1287-1288. In the last decade of the twentieth century, executive agreements – the vast majority of which were congressional-executive agreements – outnumbered Article II treaties by a ratio of approximately ten-to-one. *Id.* at 1287 ("249 treaties and 2857 executive agreements [were] concluded during this period.").

More recently still, from 1997 to 2010, the federal government entered into about 15 treaties on average per year.[10] The United States has ratified only two treaties during the 112th Congress: a Mutual Legal Assistance Treaty with Bermuda and an Investment Treaty with Rwanda. U.S. Senate, *Treaties Approved by the Senate During The Current Congress* (Sept. 26, 2011), http://www.senate.gov/pagelayout/ legislative/one_item_and_teasers/trty_rtf.htm (last visited Sept. 30, 2012).

Furthermore, only a small fraction of those Article II treaties require new implementing legislation. The vast majority of Article II treaties are either

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process. Unlike Article II treaties, their scope is limited to Congress's enumerated powers under Article I. See Hathaway, 117 Yale L.J. at 1328-1329, 1339.

[10] See Oona A. Hathaway et al., *The Treaty Power: Its History, Scope and Limits*, 98 Cornell L. Rev. (forthcoming 2013) (manuscript at 57), http://ssrn.com/abstract=2155179.

self-executing or may be implemented using existing statutory authority. Between 1989 and 2010, only about one of ten Article II treaties expressly required new implementing legislation.[11]

The historical record shows, moreover, that the Senate is much more likely to reject treaties that might implicate federalism concerns. Of the 14 submitted treaties that the Senate did not approve between 1997 and 2010, 11 were multilateral agreements, a category of treaties often cited as raising particular federalism concerns. See Hathaway et al., 98 Cornell L. Rev. (manuscript at 64). Because of the difficulty of securing approval of an Article II treaty that implicates areas of traditional state authority, the executive branch does not submit many such treaties to the Senate. Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. Cal. L. Rev. 1327, 1363 (2006) ("executive self-restraint on federalism grounds has become an increasingly visible feature of U.S. treaty-making").

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[11] Analysis of treaties submitted from 1989 to 2004 was conducted using Christian L. Wiktor, *Treaties Submitted to the United States Senate: Legislative History, 1989-2004* (2006). Analysis of treaties submitted from 2005 to 2010 was conducted by searching the text of each individual treaty, along with the Message from the President of the United States, Letter of Transmittal, and Letter of Submittal for each treaty, for the words "self-executing" or "implementing." These documents are available online at Library of Cong., *THOMAS: Treaties*, http://thomas.loc.gov/home/treaties/treaties.html (last visited Sept. 30, 2012).

2. The Political Branches Address Federalism Concerns by Modifying Treaty Obligations.

The political branches regularly modify the content of treaty obligations to address federalism concerns. "Throughout U.S. history, the treatymakers have used their conditional consent powers to guard against undue intrusions on state prerogatives * * * [t]he federalism clauses attached by the treatymakers to the U.S. ratification of modern human rights treaties reflect this tradition." Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent,* 149 U. Pa. L. Rev. 399, 409-410 (2000). The tailoring of U.S. treaty obligations to protect States' prerogatives occurs not only through modification of the treaty's text during negotiations but also through the addition of "Reservations, Understandings, or Declarations" (RUDs). A typical federalism RUD distributes implementation authority among federal, state, and local jurisdictions. Representative language can be found in reservations asserted by the United States to several major human rights treaties.[12] See Hathaway et al., 98 Cornell

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[12] See, *e.g.*, International Covenant on Civil and Political Rights, Apr. 2, 1992, S. Treaty Doc. No. 95-20; International Convention on the Elimination of All Forms of Racial Discrimination, June 21, 1994, S. Treaty Doc. No. 95-18; Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20.

L. Rev. (manuscript at 63-64) (describing federalism-oriented RUDs commonly placed by the United States on major human rights treaties).

Indeed, of the twenty-five international human rights treaties that the United Nations has identified as "core" treaties, the United States has signed 20 (80%), but the President has only submitted 17 (68%) to the Senate. *Id.* at 58. The Senate gave its advice and consent to only 12 (48%), placing explicit federalism RUDs on four. *Ibid.* Of the eight core treaties that the United States has joined without federalism RUDs, six involve international matters like armed conflict or genocide that are unlikely to raise federalism issues. *Ibid.* The remaining two were specifically tailored to avoid any conflict with state interests.[13] In addition, the transmittal package for the Convention on the Rights of Persons with Disabilities, which is currently under consideration in the Senate, includes an express federalism RUD. Letter of Transmittal, UN Convention on the Rights of Persons with Disabilities, S. Treaty Doc. No. 112-7, at 1 (2012),

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[13] Protocol Relating to the Status of Refugees art. VI(b), Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 (the federal government must make a "favourable recommendation" to the States, but need not adopt legislation to ensure state compliance); United Nations Treaty Collection, *United Nations Convention to Combat Desertification* ("no changes" to existing laws "will be required to meet [U.S.] obligations under . . . the Convention"), http://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTONLINE&tabid=2&mtdsg_no=XXVII-10&chapter=27&lang= en#EndDec (last visited Sept. 30, 2012).

http://www.gpo.gov/fdsys/pkg/CDOC-112tdoc7/pdf/CDOC-112tdoc7.pdf.

3. The United States Ordinarily Accommodates Federalism Values by Tempering Its Enforcement Strategies.

When a treaty obligation of the United States involves matters traditionally subject to state regulation, the United States frequently accommodates federalism concerns by relying on state implementation. Hathaway et al., 98 Cornell L. Rev. (manuscript at 72-75) (describing "bottom-up federalism"). It has done so without court intervention, on the basis of the political branches' judgment about the best way to carry out the country's treaty obligations.

For example, the United States frequently relies on existing state laws to enforce its obligations under the two optional protocols to the Convention on the Rights of the Child to which it is a party. Hollis, 79 S. Cal. L. Rev. at 1382-1383. The Convention on the Form of an International Will has been implemented thus far exclusively through state implementing legislation. See Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties*, 73 Mo. L. Rev. 1063, 1067 (2008).

In each case in which the United States has relied on States to implement treaty obligations, it has done so not because a court *required* it to do so, as petitioner would have it. Pet. at 26. It was instead

because the political branches decided that this was an appropriate means of effectively enforcing the treaty, consistent with federalism principles.

* * *

In short, a web of structural, political, diplomatic, and rights-protecting checks already exist to limit the application of the federal government's treaty power. These checks have been extraordinarily successful in constraining the treaty power and accommodating federalism concerns, while allowing for the flexibility the federal government needs to properly handle foreign affairs.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari in this case.

Respectfully submitted,

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OCTOBER 2012

JOINT APPENDIX

Supreme Court, U.S.
FILED
MAY 8 - 2013
OFFICE OF THE CLERK

No. 12-158

In the
Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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May 8, 2013

Petition for Writ of Certiorari Filed Aug. 1, 2012
Petition for Writ of Certiorari Granted Jan 18, 2013

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Excerpts from Memorandum of Law in Opposition to Motion to Dismiss Counts One and Two of the Indictment, *United States v. Bond*, No. 2:07-cr-00528-JG-1 (E.D. Pa. Nov. 13, 2007) [DE 30] ..... JA 30

Excerpts from Reply Brief in Support of Motion to Dismiss Counts One and Two of the Indictment, *United States v. Bond*, No. 2:07-cr-00528-J-1 (E.D. Pa. Nov. 15, 2007) [DE 31] ..... JA 33

Excerpts from Change of Plea Hearing Transcript, *United States v. Bond*, No. 2:07-cr-00528-JG-1 (E.D. Pa. Dec. 5, 2007) ..... JA 35

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The following opinions, decisions, judgments, and orders have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Appendix A

Opinion of the United States Court of Appeals for the Third Circuit (May 3, 2012) App-1

Appendix B

Opinion of the United States Court of Appeals for the Third Circuit (Sept. 17, 2009) App-48

Appendix C

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Appendix E

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RELEVANT DOCKET ENTRIES
UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 07-cr-528

UNITED STATES OF AMERICA

Plaintiff,

v.

CAROL ANNE BOND

Defendant.

Date Filed	#	Docket Text
6/7/2007	1	COMPLAINT FILED WITH AFFIDAVIT BY POSTAL INSPECTOR RICARDO BORDON as to CAROL ANN BOND (1). (jcz,) [2:07-mj-00684] (Entered: 06/08/2007)
6/8/2007	2	GONERNMENT'S MOTION AND MEMORANDUM FOR HEARING AND DEFENDANT'S PRETRIAL DETENTION, CERTIFICATE OF SERVICE BY USA AS TO CAROL ANN BOND. (jcz,) [2:07-mj-00684] (Entered: 06/11/2007)
		* * *
6/12/2007	4	Minute Entry for proceedings held before Judge L. FELIPE RESTREPO: Initial Appearance as to CAROL ANN BOND held on 6/11/07. No bail is set. Deft.

Date Filed	#	Docket Text
		stipulates to probable cause. Court continues Detention Hearing to 6/13/2007 01:30 PM in COURTROOM 5B before MAGISTRATE JUDGE L. FELIPE RESTREPO. Court Reporter ESR. (jcz,) [2:07-mj-00684] (Entered: 06/12/2007)
6/13/2007	5	Minute Entry for proceedings held before Judge L. FELIPE RESTREPO: Initial Appearance as to CAROL ANN BOND held on 6/11/07. No bail is set. Deft. stipulates to probable cause. Court continues detention hearing to 6/13/07. Court Reporter esr. (jcz,) [2:07-mj-00684] (Entered: 06/14/2007)
6/13/2007	6	WAIVER of Preliminary Examination or Hearing by CAROL ANN BOND. (jcz,) [2:07-mj-00684] (Entered: 06/14/2007)
6/15/2007	7	Minute Entry for proceedings held before Judge L. FELIPE RESTREPO Detention Hearing as to CAROL ANN BOND held on 6/13/2007. Govt. 2 MOTION for PRETRIAL DETENTION is

Date Filed	#	Docket Text
		GRANTED, No Bail set. Court Reporter ESR. (cmc) [2:07-mj-00684] (Entered: 06/15/2007)
6/15/2007	8	PRETRIAL ORDER OF DETENTION AS TO CAROL ANN BOND THAT DEFT IS HEREBY DETAINED PENDING FURTHER PROCEEDINGS IN THIS MATTER, ETC. Signed by Judge L. FELIPE RESTREPO on 6/13/07. 6/15/07 Entered and Copies Mailed, E-Mailed. (cmc) [2:07-mj-00684] (Entered: 06/15/2007)
6/26/2007	9	ARREST Warrant Returned Executed on 6/8/07 in case as to CAROL ANN BOND. (jcz,) [2:07-mj-00684] (Entered: 06/26/2007)
		* * *
9/5/2007	14	INDICTMENT as to CAROL ANNE BOND (1) count(s) 1-2, 3-4. (cw,) (Entered: 09/06/2007)
		* * *
9/28/2007	16	Minute Entry for proceedings held before Judge TIMOTHY R. RICE Arraignment as to CAROL ANNE BOND (1) Counts 1-4

Date Filed	#	Docket Text
		held on 9/27/07. Plea entered by CAROL ANNE BOND Not Guilty on counts 1–4. Trial set for 10/29/07. Court Reporter ESR. (ke) (Entered: 09/28/2007)
		* * *
10/31/2007	27	MOTION to Dismiss *Counts I and II of the Indictment* by CAROL ANNE BOND. (Attachments: #1 Appendix Index of Exhibits #2 Exhibit 1--Chemical Weapons Convention Excerpts #3 Exhibit 2--ICRC Advisory #4 Exhibit 3—Executive Order 13128 #5 Exhibit 4--Federal Offense Table #6 Exhibit 5--AG Statement in Support of CWC) (REED, ERIC) (Entered: 10/31/2007)
		* * *
11/6/2007	29	Brief in Support to Motion by CAROL ANNE BOND re 24 MOTION to Suppress, CERT. OF SERVICE, (Proposed Order) (REED, ERIC) Modified on 11/7/2007 (cmc). (Entered: 11/06/2007)
11/13/2007	30	RESPONSE in Opposition re 27

Date Filed	#	Docket Text
		MOTION to Dismiss *Counts I and II of the Indictment* filed by USA, CERT. OF SERVICE. (KURLAND, AMY) Modified on 11/14/2007 (cmc). (Entered: 11/13/2007)
11/15/2007	31	Brief in Support to Motion by CAROL ANNE BOND re 27 MOTION to Dismiss *Counts I and II of the Indictment*, CERT. OF SERVICE, (Proposed Order) (REED, ERIC) Modified on 11/16/2007 (cmc). (Entered: 11/15/2007)
		* * *
11/19/2007	33	Minute Entry for proceedings held before Judge JAMES T. GILES Hearing – Deft's. Motion to Dismiss Counts 1 & 2 as to CAROL ANNE BOND held on 11/19/2007. Counsel argues to Court. Govt's. case: Witness sworn. Court rules: Deft's. motion to dismiss counts 1 & 2 – DENIED. Deft's. motion to suppress Deft's. statement – DENIED. Court Reporter ESR. (ke) (Entered: 11/19/2007)
11/19/2007	34	ORDER DENYING 24 MOTION TO SUPPRESS STATEMENTS

Date Filed	#	Docket Text
		FILED BY CAROL ANNE BOND AND 27 MOTION TO DISMISS COUNTS I AND II OF THE INDICTMENT FILED BY CAROL ANNE BOND FOR THE REASONS STATED BY THE COURT AT THE RECORD HEARING HELD THIS DATE IN THE ABOVE MATTER, ETC. Signed by Judge JAMES T. GILES on 11/19/07. 11/19/07 ENTERED AND COPIES E-MAILED. (ke) (Entered: 11/19/2007)
		* * *
12/5/2007	36	Minute Entry for proceedings held before HONORABLE JAMES T. GILES Change of Plea Hearing as to CAROL ANNE BOND held on 12/5/07. Plea entered as to CAROL ANNE BOND (1) Guilty Counts 1-4. PSI Ordered. Sentencing date: 3/19/08 at 12:00 pm. Bail status: federal custody. Court Reporter ESR. (ke) (Entered: 12/05/2007)
12/5/2007	37	Plea Document as to CAROL ANNE BOND. (ke) (Entered: 12/05/2007)
12/5/2007	38	Abstract of Order for Presentence

Date Filed	#	Docket Text
		Investigation as to CAROL ANNE BOND. (ke) (Entered: 12/05/2007)
		* * *
5/29/2008	41	SENTENCING DOCUMENT as to CAROL ANNE BOND with Certificate of Service. (SHAPIRO, PAUL) Modified on 5/30/2008 (ke). (Entered: 05/29/2008)
5/30/2008	42	SENTENCING MEMORANDUM Certificate of Service by CAROL ANNE BOND (GOLDMAN, ROBERT) (Entered: 05/30/2008)
6/4/2008	43	Minute Entry for proceedings held before HONORABLE JAMES T. GILES Sentencing held on 6/3/08 for CAROL ANNE BOND (1), Count(s) 1–2, IMPRISONMENT 6 YEARS, SUPERVISED RELEASE 5 YEARS AS TO ALL COUNTS, SPECIAL ASSESSMENT $400.00 AS TO ALL COUNTS, FINE $2,000.00 AS TO ALL COUNTS, RESTITUTION $8,558.29 AS TO ALL COUNTS; Count(s) 3–4, IMPRISONMENT 5 YEARS. Court Reporter ESR. (ke) (Entered: 06/05/2008)

Date Filed	#	Docket Text
6/4/2008	44	JUDGMENT AS TO CAROL ANNE BOND (1), Count(s) 1–2, IMPRISONMENT 6 YEARS, SUPERVISED RELEASE 5 YEARS, SPECIAL ASSESSMENT $400.00 AS TO ALL COUNTS, FINE $2,000.00 AS TO ALL COUNTS, RESTITUTION $8,558.29 AS TO ALL COUNTS; Count(s) 3–4, IMPRISONMENT 5 YEARS, SUPERVISED RELEASE 3 YEARS. Signed by HONORABLE JAMES T. GILES on 6/4/08. 6/5/08 Entered and Copies Mailed, E–Mailed BY CHAMBERS. (ke) (Entered: 06/05/2008)
6/10/2008	45	NOTICE OF APPEAL by CAROL ANNE BOND RE: JUDGMENT with Certificate of Service. (REED, ERIC) Modified on 6/11/2008 (ke). Modified on 6/11/2008 (le,). (Entered: 06/10/2008)
6/11/2008	46	Clerk's Notice to USCA re 45 Notice of Appeal – Final Judgment. (ke) (Entered: 06/11/2008)
6/11/2008		USCA Appeal Fees received

Date Filed	#	Docket Text
		$455.00 PAID, receipt number 400 949018 as to CAROL ANNE BOND re 45 Notice of Appeal – Final Judgment. (ke) (Entered: 06/11/2008)
6/20/2008	47	Copy of TPO Form re 45 Notice of Appeal – Final Judgment (ke) (Entered: 06/20/2008)
		* * *
4/29/2009	52	Praecipe to Satisfy Judgment by USA as to CAROL ANNE BOND (ke) (Entered: 04/29/2009)
5/3/2010	53	ORDER of USCA (certified copy) as to CAROL ANNE BOND re 45 Notice of Appeal – Final Judgment That the Judgment entered in District Court 6/4/2008 is hereby AFFIRMED. (cmc) (Entered: 05/03/2010)
		* * *
5/31/2012	55	MANDATE of USCA (CASE #08–2677) (certified copy) as to CAROL ANNE BOND re Terminate Appeal. IT IS ORDERED BY THE USCA THAT THE FINAL JUDGMENT AND COMMITMENT ORDER OF THE DISTRICT COURT IMPOSED ON 6/3/08 AND

Date Filed	#	Docket Text
		ENTERED 6/5/08, BE AND THE SAME IS HEREBY AFFIRMED, ALL OF THE ABOVE IN ACCORDANCE WITH THE OPINION OF THE USCA. (ke) (Entered: 05/31/2012)

RELEVANT DOCKET ENTRIES
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2677

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

CAROL ANNE BOND
Defendant-Appellant.

Date Filed	Docket Text
6/12/2008	CRIMINAL CASE DOCKETED. Notice filed by Carol A. Bond. (SMW)
	* * *
8/8/2008	BRIEFING NOTICE ISSUED. Brief on behalf of Appellant Carol A. Bond due on or before 09/08/2008. Appendix due on or before 09/08/2008. Presentence Report due on or before 09/08/2008. (SMW)
	* * *
9/5/2008	1st STEP APPENDIX on behalf of Appellant Carol A. Bond, filed. Copies: 4. Volumes: 2. Manner of Service: mail. Certificate of Service dated 09/05/2008. (LAL)
9/5/2008	PRESENTENCE REPORT, received. (4 copies) UNDER SEAL. SEND TO MERITS PANEL. (LAL)

Date Filed	Docket Text
9/8/2008	ELECTRONIC 1st STEP BRIEF on behalf of Appellant Carol A. Bond, filed. Pages: 51, Words: 11,595, Manner of Service: mail, Certificate of Service dated 09/05/2008. (LAL)
	* * *
11/13/2008	ELECTRONIC 2nd STEP BRIEF on behalf of Appellee USA, filed. Pages: 64, Words: 10925, Manner of Service: mail, Certificate of Service dated 11/13/2008. (MS)
	* * *
3/23/2009	ARGUED on Monday, March 23, 2009 before RENDELL, AMBRO and JORDAN, Circuit Judges. Robert E. Goldman arguing for Appellant Carol A. Bond; Paul G. Shapiro arguing for Appellee United States of America. (PM)
8/14/2009	CLERK'S LETTER to counsel written at the direction of the Court. The Court requests counsel to provide supplemental memoranda, not to exceed five single-spaced pages, discussing the following question: Does appellant, Carol Bond, have standing to assert that 18 U.S.C. 229 encroaches on state sovereignty in violation of the Tenth

Date Filed	Docket Text
	Amendment to the United States Constitution absent the involvement of a state or its instrumentalities? Each party is directed to file the requested memorandum in the Clerk's Office by 4:00p.m. on Tuesday, August 25, 2009. (Please see the document attached for full text.) (TLW)
8/20/2009	ECF FILER: Response filed by Appellee USA to court letter dated 08/14/2009. Certificate of Service dated 08/20/2009.--[Edited 08/20/2009 by TLW] (PGS)
8/25/2009	ECF FILER: Response filed by Appellant Carol A. Bond to court letter dated 8/14/2009. Certificate of Service dated 08/25/2009.--[Edited 08/25/2009 by TLW] (EER)
9/17/2009	PRECEDENTIAL OPINION Coram: RENDELL, AMBRO and JORDAN, Circuit Judges. Total Pages: 28. Judge: AMBRO Authoring. (Judgment reversed by Supreme Court of the United States and case remanded for further proceedings S. Ct. No. 09-1227).--[Edited 07/28/2011 by PD] (SMW)
9/17/2009	JUDGMENT, Affirmed. (Judgment reversed by Supreme Court of the

Date Filed	Docket Text
	United States and case remanded for further proceedings S. Ct. No. 09-1227).--[Edited 07/28/2011 by PD] (SMW)
9/30/2009	ECF FILER: UNOPPOSED Motion filed by Appellant Carol A. Bond for Extension of Time to file Petition for En Banc Rehearing until/for 60 days. Certificate of Service dated 09/30/2009. (EER)
	* * *
10/06/2009	ORDER (AMBRO, Circuit Judges) granting Appellant's Motion for 60-day extension of time to file petition for rehearing, filed. Thomas L. Ambro, Authoring Judge. (SMW)
11/30/2009	ECF FILER: Petition filed by Appellant Carol A. Bond for Rehearing before original panel and the court en banc. Certificate of Service dated 11/30/2009. (REG)
12/10/2009	ORDER (SCIRICA, Chief Judge, SLOVITER, MCKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN and HARDIMAN, Circuit Judges) denying Petition for Rehearing before the original panel and the court en banc filed by

Date Filed	Docket Text
	Appellant Carol A. Bond, filed. Thomas L. Ambro, Authoring Judge. (SMW)
3/11/2010	U.S. Supreme Court Letter dated 03/09/2010 granting Appellant Carol A. Bond an extension of time to and including 04/09/2010 to file petition for writ of certiorari. Supreme Court Application No. 09A825. (CRG)
4/16/2010	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Carol A. Bond on 04/09/2010. Supreme Court Case No. 09-1227. (CRG)
	* * *
7/12/2011	ECF FILER: UNOPPOSED Motion filed by Appellant Carol A. Bond to Expedite Proceedings on Remand from the U.S. Supreme Court, with Supplemental Briefing, and Expedited Oral Argument (proposed briefing schedule is included in the text of the unopposed motion). Certificate of Service dated 07/12/2011. (ACP)
7/18/2011	Notice of issuance of U.S. Supreme Court Mandate at 09-1227 on 07/18/2011. (CRG)
7/18/2011	ReCalendared on Remand from

Date Filed	Docket Text
	Supreme Court on 07/18/2011.--[Edited 08/04/2011 by TLW]--[Edited 08/04/2011 by TLW] (TLW)
8/5/2011	ORDER (RENDELL, AMBRO and JORDAN, Circuit Judges) On 06/16/2011, the Supreme Court of the United States reversed the judgment of this Court and remanded for further proceedings. The Supreme Court's mandate issued on 07/18/2011. Presently before the Court is Appellant's motion for supplemental briefing and expedited review. It is hereby ORDERED that the motion is granted. It is further ORDERED that the parties shall file simultaneous supplemental briefs on or before 09/16/2011 and simultaneous reply briefs on or before 10/14/2011. The limitations as to length set forth in Fed. R. App. P. 32(a)(7) for principal and reply briefs shall apply to the supplemental briefs and reply briefs. Oral argument is scheduled for Wednesday, 11/16/2011 at 2:00 pm in the Maris Courtroom, 19th Floor in Philadelphia, filed. Thomas L. Ambro, Authoring Judge. (SMW)

* * *

Date Filed	Docket Text
9/16/2011	ECF FILER: ELECTRONIC SUPPLEMENTAL BRIEF on behalf of Appellant Carol A. Bond, filed. Certificate of Service dated 09/16/2011 by ECF, 3rd party.--[Edited 09/19/2011 by MCW] (PDC)
	* * *
10/14/2011	ECF FILER: ELECTRONIC SUPPLEMENTAL REPLY BRIEF on behalf of Appellee USA, filed. Certificate of Service dated 10/14/2011 by ECF. [Changed event ecf/sup/br and docket text].--[Edited 10/19/2011 by MCW] (PGS)
10/14/2011	ECF FILER: ELECTRONIC SUPPLEMENTAL REPLY BRIEF on behalf of Appellant Carol A. Bond, filed. Certificate of Service dated 10/14/2011 by 3rd party, ECF.--[Edited 10/19/2011 by MCW] (PDC)
	* * *
11/16/2011	Argued on Wednesday, November 16, 2011 before RENDELL, AMBRO and JORDAN, Circuit Judges Paul D. Clement arguing for Appellant Carol A. Bond; Paul G. Shapiro arguing for Appellee United States of America. (TLW)

Date Filed	Docket Text
	* * *
5/3/2012	PRECEDENTIAL OPINION Coram: RENDELL, AMBRO and JORDAN, Circuit Judges. Total Pages: 48. Judge: JORDAN Authoring, Judges: RENDELL and AMBRO Concurring. (SMW)
5/3/2012	JUDGMENT, Affirmed. (SMW)
5/31/2012	MANDATE ISSUED, filed. (SMW)
8/6/2012	NOTICE from U.S. Supreme Court. Petition for Writ of Certiorari filed by Carol A. Bond on 08/01/2012 and placed on the Supreme Court docket on August 3, 2012. Supreme Court Case No. 12-158. (CRG)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 07-cr-528

UNITED STATES OF AMERICA
Plaintiff,

v.

CAROL ANNE BOND
Defendant.

Date Filed: Sept. 5, 2007

Violations: 18 U.S.C. § 229(a)
(using a chemical weapon – 2 counts)
18 U.S.C. § 1708
(theft of mail – 2 counts)

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

At all times material to this indictment:

1. Potassium dichromate was a toxic chemical as defined under 18 U.S.C. § 229F(1)(A) and (8)(A) and had the potential to cause death or permanent harm to humans or animals.

2. 10-cholo-10H-phenoxarsine was a toxic chemical as defined under 18 U.S.C. § 229F(1)(A) and (8)(A) and had the potential to cause death or permanent harm to humans or animals.

3. From in or about December 2000 through on or about November 2, 2006, defendant CAROL ANNE BOND was employed by Rohm and Haas at the Spring House Technical Center as a level 5 technical assistant in the CIS / Biocides organization. At the time of her resignation, her responsibilities included microbiological challenge testing on plastics samples and some routine analytical work, including high pressure liquid chromatography (HPLC). In this position, she had access to potassium dichromate and 10-cholo-10Hphenoxarsine.

4. From in or about November 2006, through on or about June 7, 2007, in the Eastern District of Pennsylvania and elsewhere, defendant

CAROL ANNE BOND

knowingly acquired, transferred, received, retained, possessed and used a chemical weapon, that is, potassium dichromate, which is a toxic chemical not intended by defendant Bond to be used for a peaceful purpose as that term is defined in Title 18, United States Code, Section 229F(7)(A).

In violation of Title 18, United States Code, Section 229(a)(1).

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. Paragraphs 1 through 3 of Count One are incorporated here.

2. From in or about November 2006, through on or about June 7, 2007, in the Eastern District of Pennsylvania and elsewhere, defendant

CAROL ANNE BOND

knowingly acquired, transferred, received, retained, possessed and used a chemical weapon, that is, 10-cholo-10H-phenoxarsine, which is a toxic chemical not intended by defendant Bond to be used for a peaceful purpose as that term is defined in Title 18, United States Code, Section 229F(7)(A).

In violation of Title 18, United States Code, Section 229(a)(1)

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

On or about February 26, 2007, in Norristown, in the Eastern District of Pennsylvania, defendant

CAROL ANN BOND

knowingly stole, took, and abstracted United States mail from a letter box, an authorized depository for mail matter, that is, defendant stole mail from the mailbox of 24 Zummo Way, Norristown, PA.

In violation of Title 18, United States Code, Section 1708.

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

On or about April 12, 2007, in Norristown, in the Eastern District of Pennsylvania, defendant

CAROL ANN BOND

knowingly stole, took, and abstracted United States mail from a letter box, an authorized depository for mail matter, that is, defendant stole mail from the mailbox of 24 Zummo Way, Norristown, PA.

In violation of Title 18, United States Code, Section 1708.

_____ A TRUE BILL:

_____

FOREPERSON

_____

PATRICK L. MEEHAN
UNITED STATES ATTORNEY

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 07-cr-528

UNITED STATES OF AMERICA
Plaintiff,

v.

CAROL ANNE BOND
Defendant.

Date Filed: Oct. 31, 2007

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* * *

EXCERPTS FROM DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION TO DISMISS COUNTS I AND II OF THE INDICTMENT

I. Introduction

Counts I and II of the Indictment in this case allege violations of 18 U.S.C. § 229, which is the criminal liability portion of the U.S. enactment of the international Chemical Weapons Convention ("CWC" or "Convention"). Even assuming for purposes of this Motion that the United States' factual allegations are true, the charged statute does not represent a valid exercise of federal authority under the Commerce Clause, the treaty power, or other potential authority in the United States Constitution. In addition, as indicated by its application to this case, the subject statute's unbounded scope is an affront to

constitutional "fair notice" requirements. Finally, the application of the statute to the alleged facts of this case is wholly inconsistent with the stated goals and purposes of the CWC.

In sum, there is no valid constitutional basis for exercising federal jurisdiction over the CWC claims against Ms. Bond. The conduct alleged is local in nature, invokes no federal interest, and should be left to local authorities to prosecute. Accordingly, Counts I and II of the Indictment should be dismissed with prejudice.

* * *

III. Argument

* * *

B. The Underlying Statute Is Unconstitutional As Enacted And As Applied In This Case

* * *

1. Interstate Commerce Authority Does Not Support The Enactment Or The Present Application Of 18 U.S.C. 229

The United States may argue that 18 U.S.C. § 229 relies on Congress' authority to regulate interstate commerce under Article I, Section 8, Clause 3 of the Constitution. The Commerce Clause is not a valid basis for the enactment of 18 U.S.C. § 229, much less its application to this case, because the statute is not limited to situations in which a "federal nexus" exists and, on the face of the statute, prohibit all manner of activities that have nothing to do with interstate commerce and are within the states' traditional law enforcement domain. In other

words, the prohibited and charged activities do not "substantially affect" interstate commerce.

Many federal criminal statutes rely on Congress' Commerce Clause authority. *See Lopez*, 514 U.S. at 630 ("Congress has enacted many statutes (more than 100 sections of the United States Code), including criminal statutes (at least 25 sections), that use the words 'affecting commerce' to define their scope.") (Breyer, J., dissenting). Congress may regulate three categories of activity under interstate commerce authority: (1) the use of the channels of interstate commerce, (2) the "instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) activities that "substantially affect" interstate commerce. *See Id.* at 558.

The statute in question here is a penal law that, on its face, does not specifically address either interstate or intrastate commerce. *See* 18 U.S.C. § 229 *et seq*. While it generally prohibits most any activity related to chemical weapons, it does not specifically regulate the use of the channels of interstate commerce or the instrumentalities of interstate commerce. Thus, if interstate commerce is the purported constitutional basis for 18 U.S.C. § 229, it must be under the third category of Commerce Clause authority. That is, the United States must show that the prohibited activity "substantially affects" interstate commerce. *See Lopez*, 514 U.S. at 559. The United States cannot satisfy this burden generally, and particularly as applied to Ms. Bond's alleged conduct.

The penal provisions of the CWC include no jurisdictional element of a "federal nexus" that would limit the application of 18 U.S.C. § 229 to discrete situations involving an explicit connection with or effect on interstate commerce. *See Lopez*, 514 U.S. at 561-562. The federal assault statutes at 18 U.S.C. § 111-115 illustrate this issue, as each contains a "federal nexus" as an element of the crime, such as an assault on a "federal officer" (Section 111) or assaults within Congress' special maritime jurisdiction (Section 113). Further, 18 U.S.C. § 229 is not limited in application to "activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *See Id.* at 561. The prosecution of Ms. Bond under 18 U.S.C. 229 is without a valid federal interest and is therefore improper.

As mentioned above, no part of the CWC legislation itself, its enabling legislation at 22 U.S.C. § 6701, nor the regulatory scheme contain legislative findings that could assist a determination of whether 18 U.S.C. § 229 is a valid exercise of Commerce Clause authority. *See Id.* at 563. ("[T]o the extent that congressional findings would enable us evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here."). None of the legislative or regulatory materials reference any relationship of the regulated subject area (use,

possession, etc. of "chemical weapons") to interstate commerce.[1]

Of course, legislative findings would not bind the Court in considering whether 18 U.S.C. § 229 is a valid exercise of Commerce Clause authority. Indeed, such findings would likely be akin to the rejected rationales for Commerce Clause authority discussed in *Lopez*. There, the United States argued that possession of a firearm in a school zone "substantially affects" interstate commerce because it results in violent crime, which is expensive, reduces travel in areas that are perceived to be unsafe, and diminishes the learning environment, which results in a less productive citizenry and adversely impacts the economy. *See Id.* at 564.

Any attempted connection of 18 U.S.C. § 229 to interstate commerce would be at least as attenuated as the leaps of logic proffered by the United States (and rejected by the Supreme Court) in *Lopez*. This is particularly true when one considers that the allegations here are of a lone actor targeting a single person with a small amount of chemicals on two occasions. The Indictment contains no allegations that Ms. Bond crossed state lines, or even that this localized conduct had any affect on interstate commerce whatsoever. *Cf. Morrison*, 529 U.S. at 617-618 ("The Constitution requires a distinction between what is truly national and what is truly local.").

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[1] Indeed, no such findings have been forthcoming since the defense outlined the basis of the present motion to the United States months ago.

Exercising Commerce Clause authority over the possession, development, etc. of "chemical weapons," broadly defined as they are under the CWC, would be tantamount to granting the federal government the plenary police power that the Constitution explicitly withholds from Congress and reserves for the states. *See Lopez*, 514 U.S. at 566, 567. The Commerce Clause does not support such unbounded federal law enforcement domain, which is particularly inappropriate under the localized facts alleged in the prosecution of Ms. Bond. Simply put, there is no basis for federal jurisdiction under interstate commerce authority.

* * *

IV. Conclusion

There is no valid basis in the Constitution supporting the enactment of 18 U.S.C. § 229 or its application to the alleged facts of this case. Further, the statute's vague and overly broad language violates constitutional "fair notice" requirements, and its utilization here signals an unwarranted and unjustifiable federal intrusion into the domain of state law enforcement. Finally, its application to the alleged facts of this case is wholly inconsistent with the stated intent of the Chemical Weapons Convention. For these reasons, Ms. Bond requests that the Court dismiss Counts I and II of the Indictment with prejudice.

Respectfully submitted,

/s/ Eric E. Reed

Robert E. Goldman, Esq.

* * *

Attorneys for the Defendant

Date: October 31, 2007

* * *

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 07-cr-528

UNITED STATES OF AMERICA
Plaintiff,

v.

CAROL ANNE BOND
Defendant.

Date Filed: Nov. 13, 2007

EXCERPTS FROM GOVERNMENT'S MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS COUNTS ONE AND TWO OF THE INDICTMENT

Defendant argues that the statute under which she has been indicted, Title 18, United States Code, Section 229, is unconstitutional both as enacted and as applied, that the statute violates fair notice requirements and that this prosecution is inconsistent with the purposes of the statute. All of these arguments are misplaced.

* * *

III. The Statute is Constitutional as Enacted and as Applied

A. Enactment of the Statute

Bond argues that the statute does not rely on Congress' interstate commerce authority because neither the statute itself or the legislative history

reference any relationship of the use or possession of chemical weapons to interstate commerce. She also argues that there is no federal nexus as there is no jurisdictional element in the statute to ensure that the conduct affects interstate commerce on a case-by-case basis. This argument is incorrect.

Title 18, United States Code, Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties. The law was entitled "Chemical Weapons Convention Implementation Act of 1998." *See* PL 105-277. Congress may enact laws necessary to effectuate the treaty power, enumerated in Article II of the Constitution. *See Missouri v. Holland*, 252 U.S. 416, 432 (1920); *Neely v. Henkel*, 180 U.S. 109, 121 (1901); *see also* Louis Henkin, Foreign Affairs and the United States Constitution 204 & n.111 (2d ed. 1996) ("The 'necessary and proper' clause originally contained expressly the power 'to enforce treaties' but it was stricken as superfluous.") (citation omitted). If the treaty is a valid exercise of the Executive's treaty power, "there is little room to dispute that the legislation passed to effectuate the treaty is valid under the Necessary and Proper Clause." *United States v. Lue*, 134 F.3d 79, 84 (2 Cir. 1998) (discussing hostage nd taking treaty) (citation omitted); *United States v. Ferreira*, 275 F.3d 1020, 1027 (11th Cir. 2001) (discussing Convention Against Torture) *see also Holland*, 252 U.S. at 432 (noting that, under normal circumstances, "[i]f the treaty is valid there can be no dispute about the validity of [a] statute [passed] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government").

There is no dispute that the Chemical Weapons Treaty, like the Hostage Taking Treaty, was a valid exercise of the executive's treaty power. That treaty required states to "[p]rohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity." Article VII. The statute accordingly provides jurisdiction over conduct that "takes place in the United States." 18 U.S.C. § 229(c)(1). This provision is necessary to effectuate treaty obligations, and defendant's conduct is within the jurisdictional provisions.

* * *

V. Conclusion

For the reasons set forth above, the government respectfully requests that defendant's Motion to Dismiss Counts One and Two of the Indictment be denied.

Respectfully submitted,
PATRICK L. MEEHAN
United States Attorney
* * *

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 07-cr-528

UNITED STATES OF AMERICA
Plaintiff,

v.

CAROL ANNE BOND
Defendant.

Date Filed: Nov. 15, 2007

EXCERPTS FROM DEFENDANT'S REPLY BRIEF IN SUPPORT OF HER MOTION TO DISMISS COUNTS I AND II OF THE INDICTMENT

I. Introduction

In its reply to defendant's Motion to Dismiss Counts of the Indictment, the government concedes the point that neither the Chemical Weapon statute, 18 U.S.C. § 229, nor this prosecution can be upheld under the Commerce Clause of the United States Constitution.[1] Instead, the government advances the novel theory that the Treaty Power of the Constitution permits the federal government to enact federal criminal statutes, and prosecute cases under

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[1] The government states, "Title 18, United States Code, Section 229 was not enacted under the interstate commerce authority but under Congress' authority to implement treaties." Mem. at 7.

such statutes, without regard to the national-state boundaries enshrined in the Constitution and regardless of whether or the prosecution involves a federal interest.. The government relies exclusively on Congress' Article I, Section 8 authority to pass legislation "necessary and proper" to implement the exercise of other federal government powers; specifically, the Article II, Section 2 power of the President to sign and the Senate to ratify treaties with foreign nations.

This proposition, if accepted by the Court, would significantly restrike the delicate balance between the federal and state governments which underlies the unique system of federalism on which government in this country is based. As will be seen, the treaty power does not save this statute or this prosecution.

* * *

IV. Conclusion

For the foregoing reasons and those stated in her primary brief, Ms. Bond requests that the Court dismiss Counts I and II of the Indictment with prejudice.

Respectfully submitted,

/s/ Eric E. Reed
Robert E. Goldman, Esq.

* * *

Attorneys for the Defendant

Date: November 15, 2007

* * *

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 07-cr-528

UNITED STATES OF AMERICA
Plaintiff,

v.

CAROL ANNE BOND
Defendant.

Dec. 5, 2007

EXCERPTS FROM CHANGE OF PLEA HEARING TRANSCRIPT

[15] * * * THE COURT: Listen to what the Government says you did and I'll give you an opportunity thereafter to tell me whether you disagree with anything that the Government states on facts, that would be established at trial. Proceed.

MS. KURLAND: Your Honor, we would prove the following evidence, should this case go to trial.

On March 5th of 2007, the Postal Inspection Service received a complaint from a Ms. Myrlinda Haynes. She told the inspectors that someone was placing chemicals in her mailbox, on her mail, on her front door and on her vehicle's door.

She told the agents that she suspected the defendant, because the defendant is married to Clifford A. Bond, who is the father of the victim's two-year-old child.

According to Ms. Haynes, approximately, two years ago, the defendant called and made several threats to her and it was after that in November of 2006, that she began seeing powdery substances on her home and car.

The inspectors went to the victim's home to screen the chemical and they installed a video camera at the home at the victim's -- with the victim's permission.

Then, on April 12th of 2007, the defendant was seen on video camera, stealing mail from the victim's mailbox. She can be seen on the camera, opening the mailbox, examining the mail, [16] removing a business-sized envelope and then, leaving the vicinity.

That theft of mail is the basis for Court 4 of the indictment.

On May 23rd of 2007, the defendant is again seen on video camera at the victim's home, placing a red powdery substance on the inside of the car muffler, which was parked at the victim's home.

The defendant is seen going back and forth several times between her own car and the victim's car and the red powdery substance is visible on the ground beneath the victim's muff -- between the vehicle's muffler and the muffler's tailpipe.

We would also establish that the defendant worked at Rohm & Haas from Nov -- December of 2000 to November of 2006. And during those six years, she was employed as a technical assistant in the CIS Biocides Organization.

During the time she worked there at Rohm & Haas, there was an inventory entry for five pounds of potassium dichromate for a Dr. Broaden. According to Dr. Broaden, only one pound of the potassium dichromate was left from the original five pounds and this chemical was stored in a common storage locker area and the defendant had access to that area.

On June 8th, the defendant was arrested and the agents executed search warrants at her home and in her car. They found [17] a piece of stolen mail in her house and an additional tube of chemical in her car. That piece of stolen mail which was dated February 27th, 2007 is the basis for Count 3 of the indictment.

At this time, the defendant admitted that she did take the chemicals from Rohm & Haas and that she was employed there.

Your Honor, we would introduce expert testimony to describe and established what these chemicals were.

First, the red powdery substance was examined by a senior chemist from the Postal Inspection Service and he determined that it was potassium dichromate, that chemical is a strong iodizer, it's extremely destructive to the tissues of the mucus membranes and the upper respiratory tract. It can cause numerous problems and if ingested can lead to death.

The chemical is highly toxic and if it's -- and if absorbed through the skin, could also cause death.

The second chemical that was analyzed was the white powdery substance that was on the victim's front door and car door handle, that's -- that chemical

was analyzed also by the Postal Inspection Service and by the Pennsylvania State Police. And it was determinated that that chemical contained arsenic, which is -- which is toxic.

The chemical is a precursor material used to prepare a commercial biocide product. And, again, if absorbed through the skin, it could be fatal. This chemical is not available to the general public.

[18] The history of this chemical is that, it is a specialty chemical. The chemist was able to trace the sample back to a company called the Morten Company which was located in North Andover, Massachusetts in 1997.

Rohm & Haas acquired Morten Company in 1999 and the chemist, who was responsible for that chemical, maintained it for approximately, ten years and brought it with him to Rohm & Haas when he was relocated from Massachusetts to Pennsylvania.

These two highly-toxic chemicals, the potassium dichromate and 10-chloro10-H-phenoxarsine are the chemicals that are charged in Counts 1 and 2 of the indictment.

We would prove this evidence, your Honor, through the testimony of lay and expert witnesses, the introduction of physical evidence, videotapes and photographic evidence.

MR. GOLDMAN: May I have one moment, your Honor?

(Pause at 10:03 a.m.)

MR. GOLDMAN: Yes. Your Honor, we went over this yesterday and there are three or four items, we -- they don't affect her guilt.

But though she -- Ms. Bond -- has asked me to give you clarification on a few of these facts, if I may?

THE COURT: Yes, sir.

MR. GOLDMAN: Your Honor, the first question that she has -- she does not dispute the fact that she took a letter from the mailbox. April 12th, when she looked at her work records, [19] it indicated that at that time, she was in Virginia. She just -- it doesn't affect, she took the letter, she's not sure exactly if it was that day or not, I just wanted to bring that to your attention.

It's her contention -- there's two chemicals here -- it's the arsenic-type substance and the potassium di -- dichloride?

MS. KURLAND: Chromate.

MR. GOLDMAN: Dichromate, thank you.

She admits taking the arsenic substance from Rohm & Haas. It's her position that she did not take the potassium dichromate from Rohm & Haas.

She told me where she received it, we -- we have records to establish that she bought that online through Amazon.com.

And, therefore, it's her position that if there's any potassium dichromate that's missing at Rohm & Haas still unaccounted for, it's not the result of her theft, she did not take those chemicals and those chemicals were -- other individuals had common access to those chemicals at Rohm & Haas.

But again, that doesn't affect her guilty plea and --

(Whispering held off the record at 10:04 a.m.)

MR. GOLDMAN: And in -- the statement was that she was arrested on the 8th and she recalls, that she was arrested on the 7th of June.

[20] Again, none -- none of that changes any of the facts, necessary for the plea of guilty, your Honor.

THE COURT: Ms. Bond, did you take these chemicals -- these two chemicals -- and used them at various times at the premises of Ms. Haynes?

THE DEFENDANT: Yes, sir.

THE COURT: And did you do so for the purpose of trying to cause her injury?

THE DEFENDANT: Yes, sir.

THE COURT: And did you know that you were doing something wrong at the time that you engaged in that activity?

THE DEFENDANT: Yes, sir.

THE COURT: And did you appreciate that these were chemicals?

THE DEFENDANT: Yes, sir.

THE COURT: And did you know the properties of these chemicals?

THE DEFENDANT: No, sir.

THE COURT: Did you know what the chemicals could do to the human body?

THE DEFENDANT: Ah, not in detail.

THE COURT: Did you purposely select potassium dichromate?

THE DEFENDANT: No, sir.

MR. GOLDMAN: I think there might be a confusion [21] there, your Honor. Well --

(Discussion held off the record at 10:06 a.m.)

THE COURT: When --

MR. GOLDMAN: I clarified that she used potassium dichromate because she knew it was potassium dichromate and the answer is, yes.

THE COURT: When you found it online, did you select it because of some description of it?

THE DEFENDANT: No, sir.

THE COURT: Did you believe it could be harmful to Ms. Haynes?

THE DEFENDANT: Yes, sir.

THE COURT: And did you believe the other chemical cold be harmful to Ms. Haynes?

THE DEFENDANT: Yes, sir.

* * *

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 07-cr-528

UNITED STATES OF AMERICA
Plaintiff,

v.

CAROL ANNE BOND
Defendant.

June 3, 2008

EXCERPTS FROM CORRECTED SENTENCING HEARING TRANSCRIPT

[56] Dr. Larry S. Andrews - DIRECT EXAMINATION

BY MR. SHAPIRO:

Q. Dr. Andrews, let me show you what has been marked Government Exhibit 1.

MR. SHAPIRO: If I may approach, your Honor?

MR. GOLDMAN: I'll stipulate he's a chemist and an expert.

MR. SHAPIRO: Thank you.

THE COURT: The stipulation is received.

Q. Is this your *curriculum vitae*?

A. Yes, it is.

Q. Does it accurately state your background, training and experience?

A. Yes, it does.

Q. And this indicates that you have a Ph.D.?

A. Yes.

Q. In what field?

A. It's a Ph.D. in Pharmacology.

Q. And after that, it has -- it has the letters D-A-B-T?

A. That standard for Diplomat American Board of Toxicology.

Q. And what does that mean?

A. It's a certifying board in -- in toxicology, that's a professional credential, many toxicologist have.

Q. And what do you have to do in order to obtain that [57] credential?

A. You need to show evidence of proficiency in toxicology through taking a test periodically every five years.

And you need to have training, background and experience appropriate to do that.

Q. And how long have you held that certification?

A. Since 1980.

MR. SHAPIRO: Your Honor, I would move Government Exhibit 1.

MR. GOLDMAN: No objection.

THE COURT: It's admitted.

(Government Exhibit G-1 received in evidence.)

BY MR. SHAPIRO:

Q. Now, can you please describe for the Court -- are you familiar with the chemical 10 chlorophenoxarsine?

A. Yes, I am.

Q. Can you describe please for the Court generally what that is and do you have an MSD sheet for it in front of you?

A. I do.

Q. Marked Government Exhibit 2, I believe?

A. Yes, it is.

Q. 10 chlorophenoxarsine is a -- a chemical that belongs to a chemical class of organo-arsenical materials and it's -- so it represents material that contains arsenic as well as carbon and hydrogen.

[58] Q. And the MSD sheet that you have in front of you, what is its purpose?

A. The purpose of an MSDS sheet is to define for the person that is going to handle a material, what the potential hazards are of the material and how they can protect themselves while using the material.

Q. And is the MSD sheet something that is commonly used in the chemical practice?

A. Yes.

Q. What -- how is it used?

A. It's used to review safe handling procedures for the material. So, if you were to use the -- if you planned to use the material in a certain way, you could read how you need to protect yourself.

For example, you may need to wear gloves, you may need to handle the material underneath a -- a hood to control exposure to vapors or dusts.

And you may need to dispose of material in a particular way, so it may be safely disposed of.

So, it gives guidance on, basically, safe handling of the material.

Q. Now, have you had an opportunity to review the MSD sheet the arsine that we have talked about in Government Exhibit 2?

A. Yes, I have.

[59] Q. And based on your review of that and your other -- other research that you have done -- have you determined can this chemical be lethal?

A. Yes.

From the review of the -- of the MSDS sheet and from other materials on organo-arsenicals, this material can be lethal, if ingested or if it comes in contact with skin.

Q. Okay.

And those are two different pathways?

A. Yes.

Q. And do they -- and -- and generally speaking of chemicals, do those different pathways affect people differently?

A. The -- there may be a different effect from contact with the skin versus ingestion, for example, with materials as a skin irritant, 10 chlorophenoxarsine is a skin irritant.

In addition, for many chemicals the skin acts as a barrier to -- to absorption of a chemical from the skin. So, being exposed by the skin for many chemicals is much less of a hazard than ingesting the chemical.

Q. So, that there are -- so that there are different so those two different pathways are -- are broken -- of often broken out?

A. Yes.

In each of the MSDS, they will describe what happens if have the material -- it comes in contact with skin -- and [60] also, what happens if it comes in contact with eyes or if, in fact, you were to accidentally or intentionally ingest it.

Q. Okay.

I'm going to -- let me ask you -- let me ask you this, can you describe for the Court how it is this arsine chemical affects the human body, what it -- what it does chemically?

A. Chemically, this material will irritate skin and eyes.

If you were to swallow this material, it would also irritate the -- the throat and the gastrointestinal tract.

As I mentioned, ingestion of the material or contact with the skin can cause lethality, so this would be then damage to the internal organs, if -- with exposure to enough of the material. All of those are from a single exposure.

With prolonged or repeated exposure, this is material that has the ability to damage blood as well

as the central nervous system, by that I mean, the brain. And also internal organs, this type of material will damage internal organs such as the kidney or liver.

Q. And you mentioned that it -- that it damages the blood, what does it -- what does it do to the blood cells?

A. It causes hymolocist, it causes the red blood cells to break apart.

Q. And would that come from absorption through the skin as well as through ingestion?

A. Yes, it could.

[61] Q. Okay.

Have you done -- have you done calculations to determine what the legal dose of 10 chlorophenoxarsine is --

A. Yes.

Q. -- and have you had the opportunity to break down between adults and children?

A. Yes, I have.

MR. SHAPIRO: And with the Court's permission, I'm going to drag up the easel, if I may.

THE COURT: It's not necessary, you can just tell us what his conclusions are.

MR. SHAPIRO: Okay.

BY MR. SHAPIRO:

Q. So for 10 chlorophenoxarsine, what is the lethal dose for an adult?

A. Here I used data collected or included within Section 11 of the MSDS that listed an oral lethal dose

may be as low as forty-two milligrams per kilogram body weight.

From that, I calculated that about twenty-five hundred milligrams would be of -- of 10 chlorophenoxarsine would be lethal to a sixty-kilogram adult human.

And that would be given the specific gravity of -- 10 chlorophenoxarsine -- that would be equivalent to about half of a teaspoon.

Q. So, half of a -- it would take half of a teaspoon of this [62] powder to be lethal to an adult?

A. To an adult.

Q. Okay.

Now, did you do a similar --

THE COURT: If ingested or --

THE WITNESS: If ingested, yes, sir -- yes, your Honor.

BY MR. SHAPIRO:

Q. Okay.

And how about through the skin?

A. Ah, through the skin -- and here I've used the dermal LD50 that was listed on the sheet for a compositionally similar material, which indicated that an LD50 from skin contact would occur at a dose of hundred to two hundred milligrams per kilo. Given a sixty-kilo adult person, this would equate to six thousand to twelve thousand milligrams total.

And again, using a specific gravity for this, this would be somewhere in the neighborhood of one to one and a half teaspoons of material.

Q. Okay.

Now, this would be absorbed through the skin?

A. Yes, this would be absorbed through the skin.

Q. Now, you're using data for a dermal LD50, correct?

A. Yes.

Q. Explain to the Court, what is a dermal LD50?

[63] A. A dermal LD50 is the amount of the material in this case, it was administered to a rabbit -- which when placed on the skin and held in contact with skin, it was lethal to fifty percent of the animals that were used in the study.

Q. Now, is it unusual to have a chemical that has a dermal LD50?

A. Most chemicals do not have a dermal LD50 because the skin acts as a -- a pretty effective barrier to the movement of chemical across the skin with -- to systemic absorption.

Q. So, you might have a lethal -- you might have a chemical that could be toxic or lethal if ingested, but wouldn't be if placed on the skin?

A. Yes.

The gastrointestinal tract is not very much of a barrier at all to the absorption of chemicals. For example, that's how we take most of our drugs. But the skin is -- is a barrier to many materials. The outer layer of the skin does not permit absorption of many -- many materials.

But in this case for at least the compositionally-similar material, it is absorbed from the skin and it was lethal to the rabbits.

Q. Now, you say that it's unusual to have an LD50 a dermal LD50 -- what do you mean by unusual -- how unusual?

A. In -- in my experience, perhaps, nine out of ten materials would not have a dermal LD50. And so, if you looked at the MSDS [64] for those materials, you would not find a dermal LD50 for a material.

Q. Okay.

So, it's one in ten?

A. Yeah, perhaps.

Q. Okay.

THE COURT: Doctor, does the skin absorption mean that this -- these teaspoons of chemical would have to be held on the skin until there is absorption? Was that done in the rabbit experiment?

THE WITNESS: In the rabbit experiment, yes, your Honor. In the rabbit experiment, the material is held in contact with the skin.

THE COURT: Even though there would have been a burning sensation?

THE WITNESS: Yes.

BY MR. SHAPIRO:

Q. Now, did you do a cal --

THE COURT: In --

MR. SHAPIRO: Excuse me.

THE COURT: -- in a normal person, if there was a burning sensation, you'd expect the person to get away from this -- the substance?

THE WITNESS: Yes, that would be the case.

For this material, your Honor, while it's listed as [65] being an irritant, many irritant materials don't necessarily have a burning sensation associated with them.

So, while the skin may end up being red after repeated contact with the material or even red the next day after a single contact with the material, it wouldn't necessarily cause burning or itching upon contact with it.

Corrosive materials -- I'm sorry corrosive materials would definitely have a burning sort of – that's a more irritating.

THE COURT: But the -- the -- the quantity of material would have to be held onto the skin or at one time or over a period of time?

THE WITNESS: In this case, for a dermal LD50?

THE COURT: Yes.

THE WITNESS: It would be over a period of time.

Generally, the way these studies are done, the materials are held in contact for one day with the skin.

THE COURT: And is that held in contact by some kind of tape or something like that?

THE WITNESS: Yes, your Honor.

BY MR. SHAPIRO:

Q. Did you do a separate calculation for a child -- for the dose for a child?

A. Ah, yes, I did.

A child then would -- I'm sorry. Your question was --

[66] Q. We --

A. -- that for Dermal contact?

Q. Let's start with oral and then, we can do dermal or we can do it the other way, whichever you prefer.

A. Okay.

Let me go to oral ingestion of the material.

I've assumed that a child would weigh about ten kilos or twenty-two pounds for purposes of my calculation and with an LD50 of forty-two milligrams per kilo, that would be four hundred and twenty milligrams.

And so, four hundred and twenty milligrams would be a lethal dose to a ten-kilo child based on these calculations. That would be a small portion of a quarter of a teaspoon. So, it would be much less than a quarter of a teaspoon of material.

Q. So, less than one quarter of a teaspoon --

A. Yes.

Q. -- would be lethal for a child?

A. Yes.

Q. Okay.

And how about dermal?

A. From dermal contact, this would be then assuming a tens kilogram child, one thousand to two thousand milligrams of material given a specific gravity of this, this would be about a quarter of a teaspoon.

Q. And then, how about dropping down from lethal to a toxic [67] dose, did you do calculations for a toxic dose for an adult and child?

A. I did.

For --

THE COURT: What -- what dose toxic mean?

THE WITNESS: In this case, it's the dose that I would estimate to cause some toxicity to either an adult or a child, but not lethality, your Honor.

THE COURT: Injury to internal organs, but not fatal?

THE WITNESS: But not fatal, yes, your Honor.

BY MR. SHAPIRO:

Q. And your calculations were -- resulted in what?

A. For -- for an adult, I estimated that --

(Pause at 1:36 p.m.)

A. -- for an adult, I estimated that --

THE WITNESS: I'm sorry, I need to -- may I use my pen and --

THE COURT: Yes.

THE WITNESS: -- write? Thank you, your Honor.

(Pause.)

A. For an adult, I estimated that about fifty milligrams of the lethal -- about fifty milligrams of the material would be a toxic dose.

Q. And that's oral, correct?

A. That would be by oral.

[68] And for -- for a child, I estimated that about ten to twenty milligrams of an oral dose would be toxic.

Q. And can you give us volume estimates for the ten to twenty and the fifty?

A. Those would be very small fractions of a quarter of a teaspoon. Those would be a few -- a few crystals of the material.

Q. Like a pinch of salt?

A. For example, like a pinch of salt.

Q. Would be -- would be toxic to a child?

A. Would be toxic to a child, yes.

Q. And how about dermal?

(Pause at 1:39 p.m.)

A. For a dermal contact, I would estimate that five to ten milligrams of the material would be -- would be toxic to a child.

Q. Okay.

I'm sorry. I thought that ten to twenty was for oral, is there a --

(Pause.)

Q. -- it would be more, right?

(Pause at 1:40 p.m.)

A. Yes, I'm sorry.

Fifty to one hundred --

Q. Okay.

[69] A. -- would be toxic for a child.

Q. Through dermal?

A. Through dermal.

Q. Okay.

(Pause.)

Q. Did you also do calculations for a level of concern?

A. Yes, I did.

Q. Explain to the Court what's a level of concern?

A. A level of concern would be an exposure to an amount which while not necessarily causing toxicity, would be a level that -- that would not be appropriate for either an adult or a child to be exposed to.

Because it could --

Q. Harm

A. -- potentially cause harm. So --

Q. Okay.

But harm but not a toxic level of harm?

A. Yes.

Q. Okay.

And what were you calculated amounts for levels of concern for this chemical?

A. Basically, I reduced those levels that -- that I mentioned a factor of three.

Q. So, instead of ten to twenty, it would be three to -- three seven or three to eight --

[70] A. Yes.

Q. -- for the child?

So, it would be a third of a pinch of salt?

A. It would be a very small amount, yes, sir.

Q. I'd like to show you a photograph marked Government Exhibit 5.

MR. SHAPIRO: If I may, your Honor?

THE COURT: You may.

BY MR. SHAPIRO:

Q. And ask you if you can quantify as best as you can, the amounts shown in this photograph in comparison with the amounts that we've been talking about in terms of levels of concern or toxic or -- or lethal doses?

THE COURT: Now, this picture allegedly shows which chemical?

MR. SHAPIRO: This is the arsine that we've been talking about, your Honor.

A. Yes.

The -- so, what I can see is -- is particles of white material that are on the handgrip of the car and also down -- it appears to be down the side of the car.

And these would appear to be levels that -- that would definitely -- most definitely -- be of concern and toxic to the -- to a child and to an adult.

And I would say, potentially, lethal levels if a child [71] were to ingest a portion of this material.

Q. Okay.

Did you also have an opportunity to consider potassium dichromate?

A. Yes, I did.

Q. And let me show you an MSD sheet for that chemical.

And can you explain to the Court what is potassium dichromate?

A. Potassium dichromate is a potassium salt of dichromatic acid. It -- it represents a chemical compound of chrome in the plus six valent state.

Q. And do you have the MSD sheet for that in front of you marked as Government Exhibit 3?

A. Yes, I do.

Q. And from Government Exhibit 3, can you determine -- well, first of all, can you explain to the Court how does this chemical affect the human body and -- and in particular, how is it different from the arsine chemical that we were just talking about?

A. Potassium dichromate is an organic chrome material. It is in contrast to the 10 chlorophenoxarsine, potassium dichromate is a corrosive material. It -- by that I mean, it will destroy tissue upon coming in contact with tissue.

Q. So, that in answer to one of the Judge's questions before, you explained that the arsine chemical while it's listed as an [72] irritant might not necessarily burn on contact and you distinguished that from other chemicals, is this -- is this one that would burn on contact?

A. Yes.

This -- this would. This would be very irritating, causing a -- a burning sensation to skin or eyes or if you were to ingest this material to the gastrointestinal tract.

Q. Okay.

So, that in some ways this one would give you a warning the arsine would not?

A. Yes, I believe that's true.

Q. Okay.

Is it possible -- is this is it possible to ingest this chemical through breathing?

A. It is, it is possible to take this material into your body through breathing, either a mist of the material or a dust of the material. If so, it would be very irritating to the respiratory tract.

Q. And the lungs?

A. And the lungs, yes.

Q. Ah --

A. The upper respiratory tract and lungs.

Q. Now, does -- is this chemical potentially lethal?

A. Yes.

Ingestion of this chemical or skin contact with this [73] chemical has been reported to be lethal.

Q. And do we find data for this in Section 11, again?

A. Yes, it is.

There's a -- an oral LD50 in the rat of twenty-five milligrams per kilogram body weight.

And, again, a skin LD50 in a rabbit listed here as fourteen milligrams per kilogram.

Q. Now, you told us before that it was unusual to have a dermal LD50, this one has a dermal LD50, is that correct?

A. Yes, it does.

Q. Now, how do the LD50s for this chemical compare with the LD50s for the last chemical?

A. Well, the -- in particular, what I would note for this, is that the dermal LD50 for this material is reported on the MSDS to be about a half of the oral LD50.

Q. So, the dermal is actually lower than the oral?

A. Meaning this is more toxic from dermal contact than from oral ingestion.

Q. So, it's more dangerous to get it on your skin than it is actually to take it your mouth?

A. From -- from what's presented here on the material safety data sheet, yes.

Q. Is that -- now, you told us it was unusual to have an LD50 at all before, correct?

A. Yes.

[74] Q. Is it -- how unusual is it to have one where the LD50 is actually lower than the oral LD50?

A. This is quite unusual, because as I explained the- the skin represents a barrier to absorption of -- of many materials. And for the skin not to represent much of a barrier at all is unusual.

So, this is -- I would say that if -- as I mentioned before -- if nine out of ten materials didn't have -- did not have a dermal LD50, perhaps, ninety-nine out of a hundred chemicals would not have dermal LD50 lower than --

Q. Okay.

A. -- an oral LD50.

Q. Now, did you do calculations for lethality and toxicity in amounts of concern for this chemical as well?

A. Yes, I did.

Q. And for the -- for the adult, the oral toxic dose was how much?

A. That would be for oral for the adult, the oral lethal dose –

Q. Yes, please.

A. -- I've calculated would be fifteen hundred milligrams which would be -- again, using a specific gravity for this material -- would be less than a quarter of a teaspoon.

Q. So, this one is lethal for an adult at less than a quarter of a teaspoon.

[75] A. Yes.

Q. How much for a child?

(Pause at 1:50 p.m.)

A. This would be two hundred and fifty milligrams, which would actually be about a tenth of a quarter of a teaspoon.

Q. A tenth of a quarter of a teaspoon, so how --

A. Which would just be a little bit at the bottom of a quarter of a teaspoon.

Q. So, in terms of --

A. A few -- a few crystals.

Q. Just a few crystals?

Let me show you a photograph -- if I may --

(Pause at 1:51 p.m.)

Q. I'll show you Government Exhibit 14 and Government Exhibit 13.

MR. SHAPIRO: May I, your Honor?

THE COURT: Yes.

(Discussion held off the record.)

BY MR. SHAPIRO:

Q. I'm going to show you first Government Exhibit 14 which shows a tailpipe and a deposit of material on -- on the ground.

Can you identify the quantity in terms of the quantities that we've been talking about of potassium dichromate?

A. This certainly looks like several grams, perhaps, tens or [76] tens of grams of the material, 'cause there's a small pile there underneath the tailpipe.

Q. Okay.

A. This is many -- many, many -- times the sorts of levels that would -- I've talked about.

Q. So far?

A. Yeah.

Q. And let me show you Government Exhibit 13, in terms of quantities?

A. This looks like a closeup of -- of the -- of surface and these are individual crystals of the potassium dichromate.

This looks like this is -- each of these crystals are likely to be several milligrams, is what it looks like of material.

Q. So, this would be a toxic dose to a child?

A. Ah, yes. Yes, I believe this would be.

Again, the toxic dose for a child I've gone and done some estimations about what that would be. But a few crystals would be toxic to a child for this material and certainly, there's a few crystals there.

Q. I'm sorry.

And -- and what were you toxic calculations for an adult and a child?

THE COURT: We're not talking ingestion or absorption?

THE WITNESS: I'll -- I'll do both.

[77] (Pause at 1:54 p.m.)

A. From my calculations, I estimated that an oral toxic dose for the adult would be about sixty milligrams, whereas an oral toxic dose for the child would be about three milligrams.

Q. And how about dermal?

(Long pause at 1:55 p.m.)

A. So, the question was for an adult, a toxic dermal --

Q. Yes.

A. -- dose?

The toxic dermal does would be about thirty milligrams and for a child, the toxic dermal dose would be able half of a milligram.

Q. And half of a milligram, do you remember the picture with the scattered crystals, how does that compare with the scattered crystals?

A. It would be one of the smaller crystals that were on there, I would estimate would be toxic to the child.

Q. Incidently, if you got one of those crystals on your skin, what would happen?

A. You would have a burning sensation, if you got one of those crystals on your skin, almost certainly, because this -- corrosive materials tend to -- to cause a burning sensation as they -- as they destroy the tissue on your skin.

Q. And last, I'd like to show you Government Exhibit 11.

Again, in terms of quantities, how does this compare [78] with the quantities that we've been talking about?

A. This looks -- this is a door handle and there's orange material, which I believe then appears to be potassium dichromate.

There's a little deposit of it on the bottom of the door handle, which looks to be, like, a little pile of the crystals.

And -- and that looks like that might be a fraction of a gram, many, many times the types of levels that I've talked about here as being toxic or -- or potentially lethal.

And -- and then, there's further deposits up the handle that look like smaller amounts of powder.

Q. And along over near the lock?

A. I'm sorry?

Q. And -- and there are little deposits along the handle and top over near the lock?

A. Where you'd press your thumb --

Q. Yes.

A. -- onto the -- onto the lock?

Yes, I can see some -- some orange powder there which like a small amount of material. I'm not sure how much would be there.

Q. On the order --

A. It's certainly an orange color. Yeah. And certainly --

Q. -- on the order of single crystals?

[79] A. Ah, yeah, it's uncertain to me if this represents whether or not there's some -- some of the solution, some of the materials in the solution and deposited there from a thumb or -- or that, but certainly, there's material there, but I don't know how much would be there.

Q. Okay.

MR. SHAPIRO: Thank you, your Honor, nothing further.

MR. GOLDMAN: Just a few questions.

Dr. Larry S. Andrews - CROSS-EXAMINATION

BY MR. GOLDMAN:

Q. Doctor, the DSM sheets, use qualifying terms if somebody is reading them, does it not?

A. (No verbal response.)

Q. For example, if someone was looking at the -- the type of damage that could be caused, the DHM (sic) is using, can cause, may be, can cause, can be, can be, correct?

A. Yes.

Q. And that's for both chemicals that we're talking about?

A. Yes. That's -- that's typical language that would be used in --

Q. Right.

Not a certainty, but it's just advising that that's what can happen?

A. Yes.

Q. Right.

[80] And it's not until -- if you're reading the D -- the MSD sheets, the -- for example, the MSD sheet for chlorophenoxarsine gives -- if you're reading this not as detailed as you did up there with the pencil, you know, and doing calculations, it gives someone the impression that it can cause irritation, it can cause irritation of nose, throat, lungs, irritation of eyes, et cetera, correct?

A. Yes.

Q. And you don't know whether or not my client read the MSD sheets for these two chemicals, correct?

A. I -- I certainly don't know that, no.

Q. Right.

Now, are you aware that you can go to eBay and buy potassium dichromate?

A. I wasn't aware of that, but I understand you can buy a lot of things, yeah.

Q. If I may, Doctor, I'm showing you DS-1. DS-1 was accessed on eBay yesterday and for -- what is it - ten dollars?

A. I think that says, starting bid, U.S. 9.99.

Q. Right.

And you can buy it now for 12.99 --

A. Okay.

Q. -- correct?

A. Yes.

Q. So, for 12.99 you can go on eBay today and buy a pound of [81] potassium dichromate and there's no warnings on here about all the dire consequences that you've told us about today, is there?

A. I certainly don't see any warnings on this. I guess, I would -- I would comment that this is not a material safety data sheet, that

Q. Yeah.

I'm not representing that eBay is.

A. Okay.

Q. I'm showing you DS-2, which is Amazon.com for potassium dichromate accessed yesterday for the total price of $7.49, you can buy a hundred grams of potassium dichromate, do you see that?

A. Yes, I do.

Q. Okay.

And, again, looking at this, there's no warning of the dire consequences that you've advised the Court of today, correct?

A. No, I don't see any warnings.

Q. As a matter of fact, most helpful customer reviews, could -- could you read that review?

A. Ah, the review says:

I am a home schooler and needed potassium dichromate for a science experiment. I search the home school science suppliers and Google and this is

the only place I could easily find it, buy it and quickly get it.

[82] Q. So, there's no warning by Amazon.com or eBay if someone is getting the chemicals from those sites about, perhaps, a child dying?

THE COURT: Do you know what photographer's formulary potassium dichromate one hundred grams means, Doctor?

THE WITNESS: Ah, no, I don't, specifically. I -- I assume it means --

THE COURT: Well, what do you assume it means?

THE WITNESS: I assuming it means that this is for use in photography, in perhaps, developing photos, would be my assuming, but I -- I don't know that.

* * *

[83] * * * MR. GOLDMAN: Continue, your Honor?

THE COURT: Yes, sir.

MR. GOLDMAN: I just forget where I am, sometimes.

BY MR. GOLDMAN:

Q. You finished that -- the home schooler comment? You did, I remember that now. Okay.

Would you agree with me, Doctor, that if you looked up -- if some were not to look at the MSD sheets but on online and [84] take a look at other sources, that some other sources can give different statements about chemicals -- varying from the MSD sheet?

A. Ah --

THE COURT: Well, let's find out if he's explored the Internet as -- if he's explored the Internet. Thus far, I have not heard that he has.

BY MR. GOLDMAN:

Q. Are you familiar with chemical -- *The Journal of Chemical Education*?

A. Yes, I'm -- I know of that journal.

Q. In a -- a statement from *The Journal of Chemical Education* -- and I'm not taking issue with your expertise or even what your testimony is -- but here it says:

Absorbed through skin, no.

If -- if you accept that -- and I'm trying to do this very quickly -- someone could go online and read different things is my point on these chemicals?

A. Certainly.

Q. Certainly?

THE COURT: Well, are you -- are you saying that you know that there are different descriptions in the MDS on the Internet?

THE WITNESS: No, your Honor, I'm not saying that.

I -- I am agreeing that you can certainly find a [85] variety of different information, if you go on the Internet.

THE COURT: Well, the question is, do you know what you can find on the Internet?

THE WITNESS: No, your Honor, I don't.

THE COURT: Anything else is speculation.

MR. SHAPIRO: I have nothing else from this witness.

* * *

[96] Myrlinda Haynes DIRECT EXAMINATION

BY MR. SHAPIRO:

Q. Good afternoon, Ms. Haynes.

A. Hi.

[97] Q. Just so that the record has your first name spelled correctly, could you spell that, too, please?

A. M-y-r-l-i-n-d-a.

Q. Thank you.

THE COURT: Pull the microphone down towards your mouth, please. Thank you. Proceed.

MR. SHAPIRO: And, your Honor, just so that -- this is a housekeeping matter.

Ms. -- I've called Ms. Haynes to testify to some factual matter. In addition, she does have a victim statement that she wishes to read and if it's acceptable to the Court, I would have her do that separate and apart from the testimony under oath.

THE COURT: Yes. Proceed.

BY MR. SHAPIRO:

Q. Ms. Haynes, up until May of 2007, where did you live?

A. Excuse me. 24 Zummo Way.

THE COURT: You'll have to speak a little louder, please.

A. 24 Zummo Way.

Q. And that's -- and what's where?

A. In Norristown, PA.

Q. And who did you live at that address with?

A. My daughter.

Q. And her name?

[98] A. Gabrielle Haynes.

Q. And how old is she now?

A. Three.

Q. Okay.

So, up until the time you moved, she was -- what -- two at the time you moved?

A. Yeah, about two.

(Discussion held off the record.)

MR. SHAPIRO: Sure.

MR. GOLDMAN: Your Honor, I'm just going to move-- I can't see the witness, if I can just move --

THE COURT: Yes. I think it folds -- that can be folded down, can't it?

(Pause at 3:14 p.m.)

(Discussion held off the record.)

BY MR. SHAPIRO:

Q. Let me show you Government 4.

A. Yeah.

Q. Do you recognize what's marked Government Exhibit 4?

THE COURT: Now, Counsel, certain things are not contested because of the guilty plea and also because of uncontested proposed findings in the presentence investigation

MR. SHAPIRO: Yes, yes, your Honor, I -- and I'm -- I'm not going to be -- I'm not going to be long.

[99] THE COURT: I hear the promise.

BY MR. SHAPIRO:

Q. Do you recognize Government 4?

A. Yes.

Q. What is Government Exhibit 4?

A. My car.

Q. And where was that -- where did you park that car up until May of 2004?

A. In the parking lot of 24 Zummo Way.

Q. And that's where it's shown in the picture?

A. Yes.

Q. Did there come a time when you noticed some white powder on your car?

A. Yes.

Q. When was that?

A. Thanksgiving Day of '06.

Q. And can you describe to the Court, what that powder looked like?

A. It looked like -- if you take flour and you add water to it and it's spread on something, that's how it looked. But when it dries and you use a stick to, like, you know, get it off, it comes off just like baby powder.

Q. Okay.

And where was it on your car?

A. On the driver's door and the two back passenger doors.

[100] Q. And how was it -- how was it that you happened to notice the -- the white powder on your car?

A. On Thanksgiving Day of '06, I was leaving to go to Thanksgiving dinner and it was raining and I came out and just as I was about to put my hand on the' doorknob to open it up, I saw --

Q. The doorknob of the car?

A. The doorknob of the car, I saw a white residue and -- embedded on the handle and running down to the side of the car.

Q. And who -- were you by yourself?

A. No, I had my daughter, she was in my arms.

Q. And what did you do?

A. I stopped and froze for a minute. Then, I got a tissue which I had in my bag and I opened up the car door with the tissue, wipe it off, put the tissue in the dumpster and got in and proceeded with my daughter.

Q. And between November of '06 -- Thanksgiving of '06 -- and February of '07, did you see that white powder again?

A. Yes.

Q. About how many times?

A. About twenty times if you include the orange reddish stuff, then it's twenty-four times.

Q. Okay.

Did you -- did you make notes --

A. Yes.

[101] Q. -- of all the occasions --

A. Hm-hmm.

Q. -- that you saw chemical powder on your car or on your house?

A. Yes.

Q. And let me show you what's marked Government Exhibit 10.

Are these your notes of the occasions?

A. Yes.

Q. And do these record the times that you found either white powder or red powder on your car or on your house?

A. Yes.

Q. What did you do when you found the white powder?

A. When I found the white powder, I called the police. They would come out and they, basically, they can't do anything unless they see someone doing it or I saw someone doing it or my neighbor saw someone doing it, but basically they couldn't do anything.

Q. Okay.

Approximately how many times do you think you called the police?

A. About a dozen times.

Q. Did they ever test -- did the police -- ever test the

Q. Yes.

One policeman early in the morning, he tested to see [102] if it was cocaine.

Q. So, the police thought that somebody had left cocaine on your car?

A. Yeah.

Q. When they --

THE COURT: Well, it was tested for cocaine.

MR. SHAPIRO: Okay.

BY MR. SHAPIRO:

Q. When they police tested it for cocaine --

A. Hm-hmm.

Q. -- what did they find?

A. That it was not cocaine.

Q. Okay.

Did they offer you -- did they test it any other way?

A. In December of '06, I took a sample of what was left on my door to the police station.

Q. And which police -- the Norristown Police?

A. The Norristown Police station.

And they took it from me and sent it to their lab.

Q. Okay.

And this was the white or the red?

A. The white powder.

Q. Okay.

What did you -- other than call the police -- what did you do when you saw the powder?

[103] A. I would wipe it off where -- I bought a package of gloves and a bottle of Clorox, 'cause I didn't know what else to do.

So, each morning and it was sometimes, three, four times a week, that it would be on my car and I would come out and --

(Pause at 3:20p.m.)

A. I would come out and my --

Q. It's okay, just take a minute.

(Pause.)

A. I would come out with my daughter in my arms and I would hold her in my left arm and use my right arm with a glove on it and it's freezing cold outside and she's crying and I'm trying to shield her from whatever it was.

(The witness is crying.)

Q. It's okay.

A. I'm sorry.

Q. It's all right. Do you need a minute?

A. No, go ahead.

Q. Okay.

And your daughter would ride where in the car?

A. In the back seat strapped in her car seat.

And at first when I had no idea what it was, I would out and the same hand that I used to open up 'cause the only way I could get her in the car it through one of the passenger doors -- I would open up the door and put her in, had [104] her toy with the same hand, where's the toy go? In her mouth.

And the stuff was pasted not only -- like, if you look at the car door, it would just have, like, a little bit of the residue on the bottom, but if you squat down and look underneath the handle, it was pasted

under there. So, if I put my hand -- it's -- it's gonna go on my fingers and my nails.

Q. Let me show you some photographs, all right?

(Pause at 3:22 p.m.)

BY MR. SHAPIRO:

Q. Okay.

Do you recognize Government Exhibit 5?

A. Yes.

Q. Okay.

This is what?

A. The driver's door of my car.

Q. And it shows?

A. A white residue on the door handle.

Q. Okay.

And it that the kind of --

A. Yes.

Q. -- is that the matter that you would see?

A. Yes.

Q. And -- and you mentioned that you would come out and you would see residue, is that -- is that what you would --

A. That's --

[105] Q. -- see?

A. -- exactly what it would look like.

Q. Now, you mentioned that if you looked underneath -- let me show you Government 7 -- if you squat down and looked underneath, is that a view --

A. Yes.

Q. -- of underneath?

A. Underneath the door handle, yes.

Q. Okay.

And describe to the Court what it is, you would see when you looked underneath?

A. Underneath it would be pasted -- the white substance -- would be pasted underneath the handle of the door, but with the naked eye just looking at the door handle, you can't see it.

Q. Now, which doors of the car did you find the white powder on?

A. The driver's door and the two back passenger doors.

Q. Each time?

A. Each time.

Q. Let me show you Government Exhibit 8 and Government Exhibit 9.

What is Government Exhibit 8, please?

A. The back passenger door of my car.

Q. And does it show the white powder?

A. Yes.

[106] Q. And is that how you would see it --

A. Yes.

Q. -- when you came out?

And what if you looked underneath the handle -- the rear handle?

A. Then, you would see it pasted on on underneath, but looking at it like that, that -- it looks like it's just

a little bit of residue, but it would be pasted underneath the handle.

Q. Okay.

And I'm showing you now Government Exhibit 9, does that show the underneath?

A. Yes.

Q. And is there some material pasted under that?

A. Yes.

Q. And what would you do when you saw the white powder on your car?

A. In the beginning, I was wiping it off, because I had to get work and I had a long commute and to drop off my daughter at daycare, so I would wipe it off and go to work.

And then when I saw how much it was happening and every time, like, I -- I would be away from my house on a Tuesday night and return on a Wednesday night, the Thursday morning it's on the car again.

So, I went back -- I would go back in the house on the mornings that it's on the car and call the police.

[107] Q. And what advice did they give you about -- about taking care of the white powder?

A. Take it to the car wash.

Q. And did you?

A. Yes, each and every time.

Q. Now, did there -- did there come a time when you were -- when you were away from your house for an extended period?

A. Yes, in February of '07.

Q. Where did you go?

A. To a friend's house.

Q. And why did you go?

A. Because I really couldn't take it any more. I just wanted to be away from it and it felt like if my car wasn't there, then I wouldn't have to deal with it.

Q. And did you eventually come back to your house?

A. Yeah, I had to.

Q. And what did you find when you got back to your house?

A. There was reddish/yellow stuff on my house door.

Q. Let me show you a picture, Government Exhibit 11.

Do you recognize that?

A. Yes, that's my house door, the screen door of my house.

Q. And do you recognize this particular picture?

A. Yes.

Q. Is this a picture that you took, yourself?

A. Yes.

[108] Q. And is this the condition that the door was in when you found it?

A. Yes.

Q. Now, was there an occasion when you went in that door when you got a burn?

A. Yes.

Q. Tell the Court about that?

A. It was in February and I was taking my car to get a oil change and I wanted to do it before it got dark outside, 'cause I was afraid to come home when it was dark, especially, with my daughter.

So, I asked my neighbor to watch her while I ran in with bags, so that when I returned I wouldn't have all that stuff to carry.

So, I rushed in, walked around the back and I opened up the door and went it, rushing not thinking as I was coming back out, my thumb started burning me.

I ran back to the car, got in and I always keep water in the car and I washed my thumb with the water.

Q. Now, did there -- did the come a time when -- when you discovered red powder elsewhere, other than on your door handle?

A. In my mailbox.

Q. And when was that?

A. That was March of '07, the beginning of March.

Q. Let me show you Government Exhibit 12 and Government [109] Exhibit 13.

Please identify Government Exhibit 12.

A. It's my mailbox.

Q. And Government Exhibit 13, please?

A. The inside of my mailbox.

Q. and how do you recognize Government Exhibit 13?

A. Because I know that it was coleb (ph) inside of my mailbox from taking out the mail on a daily basis.

Q. And did you discover -- and how did you discover that there red crystals inside your mailbox?

A. My mailbox is on a higher level than I am, so I have to sort of kind of reach up and, like, peek in holding onto the side of my house.

And as I got the mail out, I was checking to make sure that there was -- you know -- no other pieces of mail in there and that's when I saw it.

Q. Saw what?

A. The red -- reddish/yellow substance in my mailbox.

Q. And as a result of that, did you get in touch with the postal inspectors

A. Well, first I called the police and they came out and told me what I should do is to go to the post office.

So, I went to the Norristown Police -- Post Office -- and they gave me the number to the postal investigators and I -- I called.

[110] Q. And did the postal inspectors set up cameras in your house and your neighbor's house?

A. Yes.

Q. All right.

And during the time that that was taking place, did you get a -- a call from your neighbor about something going on in the vicinity of your car?

A. Yes.

Q. I'd like to show you Government Exhibits 14 and 15. Whoops. 14 and 15.

And 14 is what?

A. My parking spot at 24 Zummo Way which has my car parked in the spot.

Q. And what's the -- and there's a reddish/brown stain behind it?

A. Yeah.

The reddish/brown stain is the same substance that I've seen on my door house -- the handle of my door house and in the mailbox.

Q. Did you also find in on your railing, once?

A. Yes, on my railing coming up the steps.

Q. Okay.

And Government Exhibit 15?

A. My tailpipe to my car.

Q. And is -- and are 14 and 15 the way your car looked on that [111] -- on that occasion --

A. Yeah.

Q. -- when the neighbor alerted you?

A. Yes.

Q. Okay.

Now, the events -- the events that are summarized on your list -- Government Exhibit 10 -- are those a fair and accurate summary of the -- of the dates of the -- of the events that occurred to you?

A. These are the ones that I know of.

The unknowns, I don't know.

Q. Okay.

And let me ask you, did you also prepare a -- a list of -- of expenses that you've incurred as a result of -- of these events that we've been talking about?

A. Yes.

Q. Let me show you Government Exhibit 16.

Is that the list?

A. Yes.

Q. All right.

And this includes -- you have an item for car washes, is that to get your car cleaned because of the --

A. Hm-hmm.

Q. -- chemicals on your car?

A. Yes.

[112] Q. The medical bills are for what?

A. After the postal inspector's tested both substance and told me what they were and how highly toxic they were, I had blood work done on myself and my daughter.

Q. And this -- and these are the doctor's visit and the -- and the -- the expenses --

A. Yes.

Q. -- for the blood work for yourself and your daughter?

A. Yes.

Q. Okay.

You also have expenses in connection with selling your house?

A. Yes.

Q. And why -- tell the Court -- why did you sell your house?

A. Because it was a constant reminder of all the chemicals and I was afraid to live there, like, I couldn't live there with my daughter any more.

And this was a house that I worked two jobs to purchase by myself.

Q. And --

A. So --

Q. -- the expenses in connection with your selling that house moving elsewhere are -- are on this list?

A. Yes.

Q. Okay.

[113] In addition to that, you rented a post office box, is that correct?

A. Yes.

Q. And why did you do that?

A. 'Cause I didn't want anybody to know where I live.

Q. And those expenses are in addition to this list, correct?

A. Yes.

Q. How much do you pay for the post office box?

A. I think it's $52.00 for the year.

Q. Okay.

And you also have started counseling, is that correct?

A. Yeah.

Q. How much does that cost you?

A. It's $25.00 co-pay every time I go, which is twice a week, sometimes, once a week.

MR. SHAPIRO: Nothing further, * * *

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

No. 07-cr-528
USM No. 61301-066

UNITED STATES OF AMERICA
Plaintiff,

v.

CAROL ANNE BOND
Defendant.

Date Filed: June 4, 2008

ROBERT E. GOLDMAN, ESQ.
Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:
X pleaded guilty to count(s) 1, 2, 3, AND 4

☐ pleaded nolo contendere to count(s) which was accepted by the court. _____

☐ was found guilty on count(s) after a plea of not guilty. _____

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18:229(a)(1)	Using a Chemical Weapon.	06/07/2007	1 & 2
18:1708	Theft of Mail.	02/26/2007	3
18:1708	Theft of Mail.	04/12/2007	4

The defendant is sentenced as provided in pages 2 through __7___ of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____ ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

June 3, 2008
Date of Imposition of Judgment

Signature of Judge

James T. Giles, USDC Judge
Name and Title of Judge

6/4/08
Date

[Handwritten: XC:ST.]

CERTIFIED COPIES TO:

Defendant

Robert E. Goldman, Esq., Atty. for Defendant

Paul G. Shapiro, AUSA

FLU

Probation (2) Alexander T. Posey

Pretrial (2)

U.S. Marshal (2)

John Zingo, Financial Manager

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: 6 YEARS.

DEFENDANT SHALL BE GIVEN CREDIT FOR ALL FEDERAL CUSTODIAL TIME SERVED WHILE AWAITING DISPOSITION OF THIS CASE.

X The court makes the following recommendations to the Bureau of Prisons:

DEFENDANT PARTICIPATE IN THE PRISON WORK PROGRAM & PROVIDE A MINIMUM PAYMENT OF $10.00

PER MONTH TOWARDS HER FINE & A MINIMUM PAYMENT OF $5.00 PER MONTH TOWARDS HER SPECIAL ASSESSMENT. TOTAL MINIMUM PAYMENT OF $15.00 PER MONTH. COURT RECOMMENDS DEFENDANT BE PLACED IN A MINIMUM SECURITY FACILITY WITHIN A REASONABLE DISTANCE FROM HER HOME.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____. with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

ADDITIONAL IMPRISONMENT TERMS

ON COUNTS 1 AND 2 – SAID SENTENCE OF 6 YEARS SHALL BE SERVED CONCURRENTLY, EACH COUNT WITH THE OTHER.

ON COUNTS 3 AND 4 – SAID SENTENCE OF 5 YEARS SHALL BE SERVED CONCURRENTLY, EACH COUNT WITH THE OTHER AND SHALL BE SERVED CONCURRENTLY WITH THE SENTENCE OF 6 YEARS IMPOSED ON COUNTS 1 AND 2.

TOTAL TERM OF IMPRISONMENT IS 6 YEARS.

DEFENDANT SHALL BE GIVEN CREDIT FOR ALL FEDERAL CUSTODIAL TIME SERVED WHILE AWAITING DISPOSITION OF THIS CASE.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 5 YEARS.

ON COUNTS 1 & 2 – SAID SENTENCE OF 5 YEARS SHALL BE SERVED CONCURRENTLY, EACH COUNT WITH THE OTHER. ON COUNTS 3 & 4 – SAID SENTENCE OF 3 YEARS SHALL BE SERVED CONCURRENTLY, EACH COUNT WITH THE OTHER AND SHALL BE SERVED CONCURRENTLY WITH THE SUPERVISED RELEASE TERM OF 5 YEARS IMPOSED ON COUNTS 1 & 2.

TOTAL TERM OF SUPERVISED RELEASE IS 5 YEARS.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain

from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

X The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

X The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

DEFENDANT SHALL COMPLY WITH ALL THE STANDARD CONDITIONS OF SUPERVISED RELEASE AND SHALL COMPLY WITH ALL THE RULES AND REGULATIONS OF THE PROBATION DEPARTMENT.

WITHIN 48 HOURS OF RELEASE FROM THE CUSTODY OF THE BUREAU OF PRISONS, THE DEFENDANT SHALL REPORT IN PERSON TO THE PROBATION OFFICE IN THE DISTRICT TO WHICH THE DEFENDANT IS RELEASED.

DEFENDANT SHALL SUBMIT TO PSYCHOLOGICAL EXAMINATION AND EVALUATION BY A PROFESSIONAL CHOSEN BY THE PROBATION DEPARTMENT AND SHALL ABIDE BY THE RECOMMENDATIONS OF THE MENTAL HEALTH SPECIALIST AS RECOMMENDED TO THE COURT BY THE PROBATION DEPARTMENT. THE DEFENDANT SHALL REMAIN IN MENTAL HEALTH TREATMENT/COUNSELING UNTIL SATISFACTORILY DISCHARGED AND WITH THE APPROVAL OF THE PROBATION OFFICE.

DEFENDANT SHALL NOT HAVE ANY CONTACT, DIRECTLY OR INDIRECTLY, WITH THE VICTIM, MYRLINDA HAYNES, OR HER MINOR CHILD.

DEFENDANT IS PROHIBITED FROM INCURRING ANY NEW CREDIT CHARGES OR OPENING ADDITIONAL LINES OF CREDIT WITHOUT THE APPROVAL OF THE PROBATION OFFICE.

DEFENDANT SHALL PROVIDE THE PROBATION OFFICE WITH FULL DISCLOSURE OF HER FINANCIAL RECORDS TO INCLUDE YEARLY INCOME TAX RETURNS UPON THE REQUEST OF THE PROBATION OFFICER. THE DEFENDANT SHALL COOPERATE WITH THE PROBATION OFFICER IN THE INVESTIGATION OF HER FINANCIAL DEALINGS AND SHALL PROVIDE TRUTHFUL MONTHLY STATEMENTS OF HER INCOME.

DEFENDANT SHALL PURSUE GAINFUL EMPLOYMENT. DEPENDING ON WHERE DEFENDANT APPLIES FOR EMPLOYMENT, DEFENDANT'S CRIMINAL RECORD MAY HAVE TO BE DISCLOSED ON DEFENDANT'S JOB APPLICATION, DEFENDANT'S CRIMINAL RECORD SHALL BE DISCLOSED TO DEFENDANT'S EMPLOYER BOTH BY THE DEFENDANT AND THE PROBATION OFFICER.

DEFENDANT SHALL SUBMIT TO DRUG/URINALYSIS TESTING, PERIODICALLY, ON A SCHEDULE TO BE DETERMINED BY THE PROBATION DEPARTMENT.

DEFENDANT SHALL BE GIVEN REPORTING DATES AND TIMES TO REPORT, EITHER IN PERSON OR BY TELEPHONE, TO THE PROBATION OFFICE BY THE PROBATION OFFICER AND DEFENDANT SHALL NOT BE PERMITTED ANY EXCUSE FOR NOT REPORTING AS DIRECTED BY THE PROBATION OFFICER.

ANY PORTION OF DEFENDANT'S FINANCIAL OBLIGATIONS NOT PAID IN FULL AT THE TIME OF DEFENDANT'S RELEASE FROM IMPRISONMENT SHALL BECOME A CONDITION OF SUPERVISION AND SHALL BE PAID AT A RATE OF NOT LESS THAN $100.00 PER MONTH TOWARDS HER FINE AND AT A RATE OF NOT LESS THAN $75.00 PER MONTH TOWARDS HER RESTITUTION. DEFENDANT'S TOTAL AMOUNT OF FINANCIAL OBLIGATIONS SHALL BE PAID AT A RATE OF NOT LESS THAN $175.00 PER MONTH TO COMMENCE 60 DAYS AFTER DEFENDANT'S RELEASE FROM IMPRISONMENT.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
Totals	$400.00	$2,000.00	$8,558.29

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority of Percentage
Myrlinda Hayes	$8,558.29	$8,558.29	1

Contact U.S. Attorney's office for Victim's address

Checks should be made payable to clerk,
U.S. District Court
601 Market Street
Room 2609
Phila., PA 19106

Totals	$8,558.29	$8,558.29

☐ Restitution amount ordered pursuant to plea agreement $_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the

☐ fine ☐ restitution.

☐ the interest requirement for the

☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than ____, or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B. X Payment to begin immediately (may be combined with ☐ C, ☐ D, or X F below); or

C. ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D. ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over

a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E. ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F X Special instructions regarding the payment of criminal monetary penalties: ANY PORTION OF DEFENDANT'S FINANCIAL OBLIGATIONS NOT PAID IN FULL AT THE TIME OF DEFENDANT'S RELEASE FROM IMPRISONMENT SHALL BECOME A CONDITION OF SUPERVISION AND SHALL BE PAID AT A RATE OF NOT LESS THAN $175.00 PER MONTH TO COMMENCE 60 DAYS AFTER DEFENDANT'S RELEASE FROM THE BUREAU OF PRISONS.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total

Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of the prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-2677

UNITED STATES OF AMERICA
Appellee,

v.

CAROL ANNE BOND
Appellant.

Argument Held: Nov. 16, 2011
Date Filed: Nov. 29, 2011

EXCERPTS FROM ORAL ARGUMENT TRANSCRIPT

[30] * * * MR. SHAPIRO: May it please the Court, [31] my name is Paul Shapiro. I'm an Assistant United States Attorney. I represent the United States in this case.

Good afternoon.

THE COURT: Good afternoon.

MR. SHAPIRO: I would like to start out with Mr. Clement's remark that the, that the commerce clause is a complete misfit, and quite the contrary is the case.

If you --

THE COURT: If that's quite the contrary why did you abandon it in the district court and get sort of the back of the hand in the Supreme Court?

THE COURT: Abandoned it affirmatively in the district court.

MR. SHAPIRO: I don't think we affirmatively abandoned it.

THE COURT: You said you're not relying on it.

THE COURT: Take a look at docket 30 page seven.

THE COURT: You just say you didn't overlook it, you turned away from it affirmatively.

[32] THE COURT: "Title 18, Section 229 was not enacted under the interstate commerce authority," period.

MR. SHAPIRO: I think that's a statement of historical fact. It is not, it is not a forfeiture of a legal position, it is a statement of historical fact, that when Congress enacted this statute it believed it was acting pursuant to the treaty power.

THE COURT: You guys are hard to follow in this case because you took one position in front of us, went to the Supreme Court, took a different one. You took one position in front of the district court on this commerce clause issue and now you're coming back and taking a different one. There's a little bit of whiplash I'm experiencing here.

When you go back to the Supreme Court are you going to have a different position than the one you're arguing in front of us now?

MR. SHAPIRO: Well, I guess, your Honor, I have in some ways no control over that answer, as I'm sure you're aware, but –

THE COURT: You're leading with your [33] commerce clause argument. Are you saying to us that's your best argument?

MR. SHAPIRO: Your Honor, I think that is the easiest argument for the court to address, simply for the reason that we have a Supreme Court case that is on point that is very recent, as opposed to a Supreme Court case that is right on point that is very old.

* * *

[38] * * * THE COURT: Back to Judge Jordan's first point. If this is your opening salvo and your best argument, why in the world didn't you make it before?

I mean -- and then we go to Judge Rendell's point is maybe you ought to just get on to the treaty power and necessary and proper in connection with that.

MR. SHAPIRO: The short answer is we should have done. I mean there's no, there's no other answer than that, we should have done.

From the --

THE COURT: But you made a calculated [39] decision not to do it for probably some very good reasons. It has -- there's a lot, used to say in the deal world, it has a lot of hair on it to say that this passes muster under the commerce clause.

* * *

PETITIONER'S BRIEF

SUPREME COURT, U.S.
FILED
MAY 8 - 2013
OFFICE OF THE CLERK

No. 12-158

In the Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Two years ago, this Court held that petitioner had standing to challenge her criminal conviction as a violation of the Constitution's structural limits on federal authority. *See Bond v. United States*, 131 S. Ct. 2355 (2011). The Court rejected the argument that Congress' reliance on the treaty power defeated petitioner's standing. On remand, however, the court of appeals held that while petitioner had standing, her constitutional challenge was a non-starter because the basic limits on the federal government's power are not "applicable" to statutes purporting to implement a valid treaty. Pet.App.36 n.21. Although it had grave misgivings about its decision, the Third Circuit viewed this startling result compelled by dictum in *Missouri v. Holland*, which states that "if [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. 416, 432 (1920). The court thus broadly construed *Holland* as allowing the Senate and the President to expand the federal government's constitutional authority by negotiating a valid treaty requiring implementing legislation otherwise in excess of Congress' enumerated powers.

The questions presented are:

Do the Constitution's structural limits on federal authority impose any constraints on the scope of Congress' authority to enact legislation to implement a valid treaty, at least in circumstances where the federal statute, as applied, goes far beyond the scope of the treaty, intrudes on traditional state

prerogatives, and is concededly unnecessary to satisfy the government's treaty obligations?

Can the provisions of the Chemical Weapons Convention Implementation Act, codified at 18 U.S.C. § 229, be interpreted not to reach ordinary poisoning cases, which have been adequately handled by state and local authorities since the Framing, in order to avoid the difficult constitutional questions involving the scope of and continuing vitality of this Court's decision in *Missouri v. Holland*?

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Cases

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Jordan v. K. Tashiro,
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143 Cong. Rec. S3309 (daily ed. Apr. 17, 1997) (statement of Sen. Reid) 6
Agreement Concerning Cooperation on the Civil International Space Station, Jan. 29, 1998, ftp://ftp.hq.nasa.gov/pub/pao/reports/1998/IGA.html 54

Antarctic Treaty, Dec. 1, 1959, 12 U.S.T. 794, http://www.nsf.gov/od/opp/antarct/anttrty.jsp 54

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Br. for United States, *Bond v. United States*, No. 09-1227 (Dec. 3, 2010) 13

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Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993 ..... *passim*

Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399 (2000) 31

Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390 (1998) 39

Int'l Comm. of the Red Cross Advisory Serv. on Int'l Humanitarian Law, Fact Sheet: 1993 Chemical Weapons Convention (2003), *available at* http://www.vertic.org/media/assets/nim_docs/Reference%20(general%20background%20information)/ICRC%20factsheet-CWC-English.pdf 4

Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867 (2005) 25

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Restatement (Third) of Foreign Relations Law § 321 cmt. b (2012) 59

Robert Knowles, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 Nw. U. L. Rev. 735 (2001) 25

Shorter Oxford English Dictionary (5th ed. 2002) 53

The American Heritage College Dictionary (3d ed. 1997) 53

The Federalist No. 45 (James Madison) (Jacob E. Cooke ed., 1961) 24

Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 18 U.S.T. 2410, http://www.state.gov/t/isn/5181.htm 53

OPINIONS BELOW

The opinion of the court of appeals is reported at 681 F.3d 149 and reproduced at Pet.App.1–47. The court's earlier opinion denying petitioner standing is reported at 581 F.3d 128 and reproduced at Pet.App.48–72. This Court's decision reversing that opinion is reported at 131 S. Ct. 2355. The district court's unpublished bench ruling denying petitioner's motions to suppress and dismiss is reproduced at Pet.App.84–85.

JURISDICTION

The court of appeals issued its opinion on May 3, 2012. Pet.App.1. The petition was timely filed and was granted on January 18, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Necessary and Proper Clause, the Treaty Clause, and the Tenth Amendment to the United States Constitution are reproduced at S.1a–3a.

The relevant portions of the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the "Chemical Weapons Convention") are reproduced at Add.19a–34a and available at http://www.opcw.org/chemical-weapons-convention.

The relevant portions of the Chemical Weapons Convention Implementation Act are codified at Title 18, section 229 of the United States Code and reproduced at Add.4a–11a.

STATEMENT OF THE CASE

This case raises fundamental questions about whether there are any limits on Congress' authority to implement an international treaty. But the underlying facts are far removed from the United States' treaty obligations or any issues of national or international importance. Instead, the case arises out of a domestic dispute over marital infidelity that took place in a small residential borough in Montgomery County, Pennsylvania. In a misguided attempt to exact revenge on an erstwhile friend for having an affair with her husband, petitioner spread toxic chemicals on door handles and other surfaces her romantic rival was likely to touch, resulting on one occasion in a minor thumb burn.

Instead of leaving this decidedly local crime to local law enforcement, federal authorities stepped in and not only charged petitioner with a federal crime, but quite astonishingly charged her with violating a federal statute that implements an international arms-control agreement designed to eradicate chemical weapons. To defend this prosecutorial decision, the government interprets this statute, which carries the kind of draconian penalties appropriate for those who traffic in chemical weapons, as containing no jurisdictional element limiting its application to a subset of poisoning cases of distinctly national or international concern. Rather, in the government's view, the statute extends to every malicious use of chemicals nationwide, with only the discretion of federal prosecutors to protect the federal-state balance.

The government's sweeping interpretation of the statute depends upon an equally sweeping theory of Congress' authority that threatens the bedrock notion that the federal government is one of limited and enumerated powers. According to the government, the ratification of a valid non-self-executing treaty frees Congress from the Constitution's liberty-protecting structural constraints and permits it to enact any legislation rationally related to the treaty. Because the government has prosecuted petitioner and ensured that she served a six-year federal sentence for inflicting a thumb burn, it has little choice but to insist on this breathtakingly broad theory and resist any effort to construe the statute to avoid obvious constitutional concerns. The question before this Court is whether this remarkable assertion of federal power can be reconciled with the Constitution, this Court's precedents, the treaty, or even the statute.

A. The Chemical Weapons Convention

The Chemical Weapons Convention is an international arms-control agreement established to combat the proliferation of weapons of mass destruction by outlawing the production, stockpiling, and use of chemical weapons. Its objective is to "achiev[e] effective progress towards general and complete disarmament ..., including the prohibition and elimination of all types of weapons of mass destruction." Conv. Preamble. The Convention thus reinforces the 1924 Geneva Protocol prohibiting chemical warfare and "belongs to the category of instruments of international law that prohibit weapons deemed particularly abhorrent." Int'l

Comm. of the Red Cross Advisory Serv. on Int'l Humanitarian Law, Fact Sheet: 1993 Chemical Weapons Convention (2003), *available at* http://www.vertic.org/media/assets/nim_docs/Reference%20(general%20background%20information)/ICRC%20factsheet-CWC-English.pdf.

As is typical of treaties, especially those addressing rules of *warfare*, the Convention imposes obligations on nation-states, not individuals. Article I obligates signatory states "never under any circumstances" to "use," "develop, produce, otherwise acquire, stockpile or retain chemical weapons." Conv. Art. I(1). Articles II and IV establish an elaborate reporting and verification process, requiring signatory states to destroy any chemical weapons and establish inspection and monitoring processes to be conducted by an international organization based in The Hague, Netherlands.

In conjunction with these and other prohibitions on state action, the Convention obligates signatory states to adopt measures prohibiting individuals from engaging in activities that would violate the Convention if undertaken by a signatory state. Conv. Art. VII. But the Convention itself does not directly impose those prohibitions. Instead, the Convention is what is known as a "non-self-executing" treaty. The distinction between self-executing and non-self-executing treaties is as old as the Republic, and this Court has recently reaffirmed its importance in the constitutional structure. *Medellin v. Texas*, 552 U.S. 491, 504 (2008). As the Court explained, it has "long recognized the distinction between treaties that automatically have effect as domestic law, and those

that—while they constitute international law commitments—do not by themselves function as binding federal law." *Id.* Only when a treaty "operates of itself without the aid of any legislative provision" does it become the supreme law of the land. *Foster v. Neilson*, 27 U.S. 253, 314 (1829). By contrast, "[w]hen the stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect." *Whitney v. Robertson*, 124 U.S. 190, 194 (1888).

As relevant here, the Convention falls squarely into this non-self-executing category: It does not directly create any domestic law governing individuals, but rather obligates signatory states to enact their own laws prohibiting individuals from engaging in activities that would violate the Convention if undertaken by a signatory state. The Convention does not require states to adopt these measures in any particular manner or seek to alter any nation's internal lawmaking processes. To the contrary, it expressly recognizes and accommodates the diversity of those varying processes, mandating that each signatory state "shall, *in accordance with its constitutional processes*, adopt the necessary measures to implement its obligations." Conv. Art. VII(1) (emphasis added). Those obligations include "enacting penal legislation" to ensure that no "natural and legal person[] anywhere on its territory or in any other place under its jurisdiction" shall "undertak[e] any activity prohibited to a state Party under this Convention." *Id.*

B. Ratification and Implementing Legislation

The U.S. Senate ratified the Convention in April 1997. By that time, the United States had already committed to eliminating its own chemical weapons. The Convention was thus viewed as an opportunity to "make it less likely that our Armed Forces will ever again encounter chemical weapons on the battlefield, less likely that rogue states will have access to the material needed to build chemical arms, and less likely that such arms will fall into the hands of terrorists." 143 Cong. Rec. S3309 (daily ed. Apr. 17, 1997) (statement of Sen. Reid).

At the time of ratification, Congress already had in place a federal prohibition on the use of chemical weapons by individuals, which was enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 521, 110 Stat. 1214, 1286–87. The prohibition was housed in the "Terrorism" chapter of Title 18 of the U.S. Code, *see* 18 U.S.C. § 2332c (1996), and cross-referenced in various other anti-terrorism statutes, including the provision making it a crime to provide material support to a terrorist, *see* 18 U.S.C. § 2339A (1996). Section 2332c criminalized the use of chemical weapons, but defined "chemical weapon" to include only a "weapon that is designed or intended to cause widespread death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals or precursors of toxic or poisonous chemicals." 18 U.S.C. § 2332c(b)(2) (1996).

When the Senate ratified the Convention, Congress repealed section 2332c and enacted a new

chapter of Title 18 devoted entirely to the regulation of chemical weapons. *See* Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681–856, *codified at* 18 U.S.C. §§ 229 *et seq.* The operative criminal provision of that legislation makes it unlawful for any person "knowingly" to "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. § 229(a)(1).

Consistent with the Convention's focus on weapons of mass destruction, the statute carries substantial penalties and unusual restrictions. *See, e.g., id.* §§ 229A, 2332b(g)(5)(B)(i), 3142(f)(1)(A), 3143(b)(2), 3142(f)(1)(A). When a violation of its provisions results in "the death of another person," the statute mandates a sentence of no less than life in prison and makes the defendant eligible for the death penalty. *Id.* § 229A(a)(2). Those harsh penalties and restrictions are nearly identical to those in the repealed anti-terrorism provision the new legislation replaced. *See* 18 U.S.C. § 2332a (1996). Congress also substituted references to the repealed statute throughout the U.S. Code with references to section 229. Accordingly, under federal law, anyone who provides material support in the commission of a violation of section 229 has materially supported a crime of terrorism and can face 15 years in prison—or even life, if the death of any person results. 18 U.S.C. § 2339A. Likewise, anyone who harbors or conceals someone who has violated or is about to violate section 229 has harbored or concealed a terrorist and can face ten years in federal prison. *Id.* § 2339.

Like the Convention, the implementing legislation defines "chemical weapon" much more broadly than Congress' earlier statute as encompassing any "toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter." *Id.* § 229F(1)(A). The statute also defines "toxic chemical" broadly to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." *Id.* § 229F(8)(A). Any substance that satisfies this extraordinarily capacious description is therefore presumptively a prohibited "chemical weapon."

What at least potentially prevents the statute from sweeping so broadly as to produce absurd results is its exclusion of any toxic chemical "intended for a purpose not prohibited under this chapter." *Id.* § 229F(1)(A). That provision avoids the classification of every toxic chemical as a chemical weapon and thus, properly interpreted, prevents countless household cabinets from becoming potential chemical weapons caches. Under the Convention, a toxic chemical is "intended for purposes not prohibited" and, therefore, does not qualify as a "chemical weapon" when it is used for "[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." Conv. Art. II(1), (9). The statute contains a similar exclusion, albeit with a slightly different formulation: A toxic chemical is not a chemical weapon if it is intended for "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." 18 U.S.C. § 229F(7)(A). Unless this exclusion is construed

sensibly, the statute has the potential to reach all sorts of garden-variety assault and poisoning crimes that have nothing to do with the Convention and its disarmament concerns.

C. The Underlying Domestic Dispute

Petitioner Carol Anne Bond is a 42-year-old woman who, before her incarceration, lived with her husband and adopted child in Lansdale, Pennsylvania. Pet.App.110–11. Petitioner is originally from Barbados, where she was raised by her mother and remembers her father having multiple affairs and children outside of marriage. Pet.App.109. In 1995, petitioner moved to the United States, where she became close friends with Myrlinda Haynes, another Barbados immigrant who lived nearby in Norristown, Pennsylvania. Over time, petitioner came to regard Haynes as a sister. Pet.App.100, 110.

In 2006, Haynes announced that she was pregnant. Unable to bear a child of her own, petitioner was excited for her closest friend. Pet.App.49. But that excitement vanished when petitioner discovered that her husband was the father. Pet.App.49. The double betrayal brought back painful memories of her own father's infidelities, and petitioner suffered an emotional breakdown. Pet.App.116–17. She was depressed, her hair fell out, and she endured several panic attacks. Pet.App.115–17. In the midst of this breakdown, petitioner decided to punish Haynes. Pet.App.91. She purchased some potassium dichromate (a chemical commonly used in printing photographs) from Amazon.com, and stole a bottle of

10-chloro-10-H-phenoxarsine (an arsenic-based chemical) from her employer. Pet.App.49. Petitioner knew the chemicals were irritants and believed that, if Haynes touched them, she would develop an uncomfortable rash. Pet.App.101. Although both chemicals are toxic and, if ingested or exposed to the skin at sufficiently high doses, can be lethal, Pet.App.49 n.1, the undisputed evidence shows that petitioner did not intend to kill Haynes, Pet.App.101, 104.

Between November 2006 and June 2007, petitioner went to Haynes' home on several occasions and spread chemicals on her car door, mailbox, and doorknob. Pet.App.49–50. These attempted assaults were neither sophisticated nor successful. Haynes avoided the easy-to-spot chemicals (potassium dichromate is bright orange) on all but one occasion when she sustained a minor chemical burn on her thumb, which she treated by rinsing with water. Pet.App.97. That single thumb burn is the only physical injury Haynes ever sustained. Pet.App.97.

When Haynes complained to local police and the postal service, postal inspectors installed surveillance cameras in and around her home. Pet.App.50. The cameras captured petitioner opening Haynes' mailbox, stealing an envelope, and stuffing potassium dichromate inside the muffler of Haynes' car. Pet.App.50.

On June 8, 2007, postal inspectors arrested petitioner. Pet.App.87. Petitioner's arrest shocked her family and friends, who considered the attempted assaults completely out of character. Pet.App.111–15. A doctor performed a mental health evaluation

and concluded that petitioner was "unable to control behavior she knew was wrongful" because she was suffering from an "intense level of anxiety and depression." Pet.App.117. In the doctor's view, petitioner was "not likely to recidivate." Pet.App.117.

D. Procedural History

While petitioner's conduct is not to be condoned, no one has ever suggested that it violates the Chemical Weapons Convention. Her actions did not involve chemical warfare, stockpiling chemical weapons, or any other activity the Convention prohibits signatory states from undertaking. This domestic dispute, arising out of marital infidelity and culminating in a thumb burn, thus would seem to be a natural candidate for local law enforcement. Petitioner's conduct likely violates one or more Pennsylvania statutes, including statutes that criminalize simple assault, 18 Pa. Cons. Stat. § 2701, aggravated assault, *id.* § 2702, and harassment, *id.* § 2709. Petitioner accepted full responsibility for her actions and, under state law, likely would have faced a prison sentence of between three and 25 months.

But local law enforcement officials were not allowed to handle this local crime. Instead, federal prosecutors stepped in and decided to employ a novel, heavy-handed approach: They charged petitioner with violating, *inter alia*, the Chemical Weapons Convention Implementation Act, on the theory that her actions amounted to use of a chemical weapon. On September 5, 2007, a federal grand jury returned an indictment charging petitioner with two counts of knowingly acquiring, transferring, receiving, retaining, possessing, and using a chemical weapon,

described as "a toxic chemical not intended by defendant Bond to be used for a peaceful purpose" within the meaning of section 229F(7)(A). JA21. Petitioner was also indicted on two counts of theft of mail, in violation of 18 U.S.C. § 1708.

Petitioner moved to dismiss the section 229 charges, arguing that, as applied to her conduct, the statute exceeds Congress' enumerated powers, invades the powers reserved to the States by the Tenth Amendment, and criminalizes conduct that lacks any nexus to a legitimate federal interest. JA23. Petitioner initially argued that the statute exceeded both Congress' power under the Commerce Clause and its power under the Necessary and Proper Clause to implement a treaty, JA24–28, but the government responded by expressly disclaiming and abandoning any reliance on the Commerce Clause, JA31 ("Section 229 was not enacted under the interstate commerce authority"). Accordingly, the district court proceedings focused on the scope of Congress' power to implement treaties. The court denied petitioner's motions in November 2007, after which she entered into a conditional guilty plea that reserved her right to appeal. Pet.App.74–75, 84, 89–90. The district court sentenced petitioner to six years in prison and five years of supervised release, and ordered her to pay a $2,000 fine and $9,902.79 in restitution. Pet.App.52.

Petitioner timely appealed and, in September 2009, the court of appeals affirmed without resolving her constitutional objections. Pet.App.48–72. The court recognized that her constitutional arguments raised difficult issues and noted significant debate

over the "scope" of *Missouri v. Holland*, 252 U.S. 416 (1920). Pet.App.57. Instead of reaching the merits of petitioner's constitutional challenge, however, the court accepted the government's contention that petitioner lacked standing to raise it.

This Court granted certiorari. Abandoning its earlier argument that petitioner lacked standing, *see* Pet.App.4–5 nn.1 & 2, the government confessed error but urged the Court to adopt a new, bifurcated standing test under which an individual could raise an "enumerated-powers" claim but not an "interference-with-state-sovereignty" claim when challenging a federal law as inconsistent with the Tenth Amendment. *See* Br. for United States 13–20, *Bond v. United States*, No. 09-1227 (Dec. 3, 2010). The *amicus curiae* appointed to defend the judgment argued, by contrast, that individuals have no standing to challenge treaty-implementing legislation as beyond the scope of Congress' enumerated powers because Congress' power to implement treaties is not constrained by Article I. *See* Br. for *Amicus* 29–33, 38–42, *Bond v. United States*, No. 09-1227 (Jan. 20, 2011).

The Court rejected both the government's bifurcated test and the *amicus*' treaty power argument and concluded that petitioner had standing to raise her federalism arguments. In doing so, the Court reiterated that federalism is not simply "an exercise in setting the boundary between different institutions of government for their own integrity," but also "protects the liberty of all persons within a State by ensuring that laws enacted in excess of delegated governmental power cannot direct or

control their actions." *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). The Court also explained that the principle that "[i]mpermissible interference with state sovereignty is not within the enumerated powers of the National Government" is "intertwined" with the principle that "action that exceeds the National Government's enumerated powers undermines the sovereign interest of States." *Id.* at 2366. Accordingly, the Court concluded that petitioner was not precluded from raising either of these closely related arguments "to object that her injury results from disregard of the federal structure of our Government." *Id.* at 2366–67.

On remand, the government again shifted its position, this time attempting to resurrect the expressly disavowed argument that the statute could be defended as an exercise of Congress' Commerce Clause authority. *See* Pet.App.4 & n.1. The Third Circuit would have none of it and expressly declined to consider this "newly-discovered" argument, Pet.App.27 n.14, which the panel repeatedly noted during argument had been "affirmatively" "abandoned," JA 101. The court instead affirmed on the theory that section 229, as applied to petitioner, is a constitutional exercise of the federal power to implement treaties. Although the court "agree[d] with Bond that treaty-implementing ought not, by virtue of that status alone, stand immune from scrutiny under principles of federalism," it deemed itself bound by *Missouri v. Holland* to conclude that "because the Convention is an international agreement with a subject matter that lies at the core of the Treaty Power, ... 'there can be no dispute about the validity of [a] statute' that implements" it.

Pet.App.2 (quoting *Holland*, 252 U.S. at 432). In its view, *Holland* compelled the result that "principles of federalism will ordinarily impose no limitation on Congress's ability to write laws supporting treaties, because the only relevant question is whether the underlying treaty is valid." Pet.App.6–7. As the court put it, "the arguable consequence of *Holland* is that treaties and associated legislation are simply not subject to Tenth Amendment scrutiny, no matter how far into the realm of states' rights the President and Congress may choose to venture." Pet.App.17.

The court also rejected petitioner's argument that section 229 could and should be construed to avoid this constitutional question. Although the court acknowledged that the government's reading renders the statute "striking" in its "breadth" and has the potential to turn every "kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache," Pet.App.10 n.7, it nonetheless declined to construe the statute to avoid such absurd and unintended consequences.

Judges Rendell and Ambro each filed separate concurrences. In Judge Rendell's view, "nothing" in this Court's cases recognizing structural limits on federal power "suggests a principle of federalism that would apply to this case." Pet.App.41. Judge Ambro, by contrast, had serious reservations about the court's decision. Pet.App.45. He voiced concern that *Holland* has been interpreted as granting Congress "a blank check" where treaties are concerned, and emphasized that "[t]his acquirable police power" is antithetical to "the fundamental principle" that the powers of the federal government are few and

defined. Pet.App.45 & n.1. Judge Ambro also noted that, "if ever there were a statute that did test" the limits of Congress' power to implement treaties, "it would be Section 229," which "federalizes purely local, run-of-the-mill criminal conduct" and is "a troublesome example of the Federal Government's appetite for criminal lawmaking." Pet.App.46. Judge Ambro expressed his "hope" that this Court would "clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it." Pet.App.46–47.

SUMMARY OF ARGUMENT

If section 229 really extended to petitioner, then it clearly would exceed Congress' limited and enumerated powers. Although Congress' powers are considerable, they are not plenary. A general police power is antithetical to the very process of enumerating Congress' powers in Article I, section 8 of the Constitution. It is thus clear that, in the absence of any relevant treaty, Congress would lack the power to criminalize every poisoning or every malicious use of chemicals in the Nation.

The government does not appear to take issue with this bedrock principle, but suggests that the ratification of a valid non-self-executing treaty changes everything. In the government's view, if the Senate ratifies such a treaty, then Congress necessarily gains the authority to enact legislation to rationally further the treaty's objectives, without regard to the structural constraints on Congress' power. This view is not just mistaken, but dangerously so. Especially in light of the broad

subject matters addressed in modern treaties, the government's argument would allow the agreement of the President, the Senate, and a foreign nation to render the Framers' careful process of enumerating Congress' limited powers for naught.

The government attributes its theory to this Court's decision in *Missouri v. Holland*, but *Holland* does not stand for this alarming proposition. *Holland* addressed a facial challenge to legislation designed to implement a migratory bird treaty. Both the constitutional attack and this Court's reasoning focused on the validity of the treaty. Almost in passing, this Court suggested that if the treaty were valid, Congress would have the power to implement it through the Necessary and Proper Clause. The government seizes on this one line, but ignores the balance of the opinion, which considers and weighs the state and federal interests at issue. All of that would have been unnecessary if the government's reading were correct.

The government's reading of *Holland* also ignores the critical distinction between self-executing and non-self-executing treaties. The latter require subsequent implementing legislation, and it is entirely possible for the Senate to ratify a valid non-self-executing treaty that can be implemented via either valid or invalid legislation. The validity of the treaty does not guarantee the validity of actions taken to implement it. This Court has already recognized as much in the context of the Constitution's horizontal separation of powers. In *Medellin*, the Court insisted that the President's efforts to comply with a treaty comport with the

structural provisions that divide responsibility between Congress and the President. There is no reason for a different result when it comes to the structural provisions that divide responsibility between the federal government and the States.

To the extent *Holland* is to the contrary, it would need to be overruled. Such a holding would be inconsistent with a host of subsequent precedents that recognize that treaty-implementing legislation is subject to the Bill of Rights, that the Constitution's structural provisions protect individual rights just as much as the first eight amendments, and that these structural provisions are too important to be excused in the name of efficiency.

Although the constitutional issues this case presents are critical, section 229 can be interpreted to avoid them. The government would read the statute as lacking anything resembling a jurisdictional element. In its extreme view, the statute reaches every malicious use of chemicals, and only prosecutorial discretion can ensure that prosecutions have some connection to the goals of the Convention. This case confirms that prosecutorial discretion is not an adequate answer. But there is an interpretation of section 229 that ensures that it applies only to the kind of conduct the Convention addresses—namely, warlike conduct that would violate the Convention if undertaken by a signatory state. That more limited reading of the statute would also comport with Congress' view that a violation of section 229 is per se a crime of terrorism. Most important, that construction would avoid rendering section 229

unconstitutional in the vast majority of its potential applications, including this one.

The only alternative to this saving construction is to hold section 229 unconstitutional as applied to petitioner. Domestic disputes culminating in a thumb burn neither implicate the concerns of the Chemical Weapons Convention nor come within Congress' authority. Although this Court has recognized the breadth of Congress' power, it has constantly insisted that the police power was reserved to the States. That point is fundamental. It defines the kind of government the Framers created--a limited national government with enumerated powers addressed to matters of distinctly national and international concern. Consistent with that framework, Congress enjoys considerable options when implementing a valid non-self-executing treaty. But ratification of such a treaty neither confers upon Congress a police power nor guarantees the validity of federal implementing legislation. Such legislation must comport with our constitutional system, including the critical structural guarantees of federalism. If section 229 applies to petitioner, it fails that vital test.

ARGUMENT

I. The Constitution Does Not Grant Congress A Police Power, And The Ratification Of A Valid Non-Self-Executing Treaty Does Not Change That Bedrock Principle.

A. Congress Does Not Have the Power To Make Every Malicious Use of Chemicals a Federal Crime.

If section 229 really made every malicious use of chemicals a federal crime, it clearly would exceed Congress' limited and enumerated powers. Congress lacks the power to criminalize every malicious use of chemicals for the simple reason that it lacks a general police power. Such a plenary authority is antithetical to the entire enterprise of enumerating Congress' distinct powers in Article I, section 8 of the Constitution. It is thus axiomatic that our constitutional scheme "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 566 (1995). "With its careful enumeration of federal powers and explicit statement that all powers not granted to the Federal Government are reserved, the Constitution cannot realistically be interpreted as granting the Federal Government an unlimited license to regulate." *United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000). Instead, the police power "belongs to the States and the States alone." *United States v. Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring).

The absence of a national police power is a critical element of the Constitution's liberty-preserving federalism. The basic "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the States .... in part, [as] an end in itself, to ensure that States function as political entities in their own right." *Bond*, 131 S. Ct. at 2364. But equally important, "the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct. at 2364. Leaving the police power in the hands of state governments closer to the people secures to individuals "a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id.*

There is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618. "Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law.'" *Lopez*, 514 U.S. at 561 n.3 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1992)); *see also Montana v. Engelhoff*, 518 U.S. 37, 43 (1996) (plurality opinion) ("preventing and dealing with crime is ... the business of the States"). None of this is to deny Congress' ability to enact criminal statutes. But the

federal government may step into the States' traditional criminal realm only when it targets conduct that implicates matters of national or international, not just local, concern. Prohibiting assaults on ambassadors or poll workers or on federal enclaves is one thing; prohibiting assault *simpliciter* is quite another. "Were the Federal Government to take over the regulation of entire areas of traditional state concern," rather than limiting its laws to matters of distinctly federal concern, "the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory." *Lopez*, 514 U.S. at 577 (Kennedy, J., concurring).

In keeping with that basic division of power, this Court has never accepted the argument that Congress may regulate criminal conduct with no nexus to matters of federal concern. Despite the gradual expansion of federal authority, this one constant has never changed. Indeed, the Court is typically unwilling to assume that Congress even *attempted* to "dramatically intrude[] upon traditional state criminal jurisdiction" in this impermissible manner. *United States v. Bass*, 404 U.S. 336, 350 (1971) (construing federal firearms statute not to reach every possession of a firearm); *see also Jones v. United States*, 529 U.S. 848, 855 (2000) (construing federal arson statute not to reach every building). And in the rare instances when the inference that Congress actually intended such an intrusion is unavoidable, the Court has not hesitated to hold the law unconstitutional. *See, e.g.*, *Lopez*, 514 U.S. at 567 (holding unconstitutional federal law that sought to criminalize possession of a gun in a local school

zone); *Morrison*, 529 U.S. at 617 (holding unconstitutional federal law that sought to regulate all gender-motivated crimes of violence).

There can be no serious dispute that a federal effort to criminalize every malicious use of chemicals throughout the Nation could not be reconciled with these fundamental principles. Poisonings and assaults involving harmful substances were not unknown to our founding generation. Yet it would have been unthinkable to the Framers that such matters would be anything other than a state concern. To be sure, there is some small subset of such crimes that touches on matters of federal concern. Even the Framers would recognize that poisoning the French Ambassador or a United States military officer would come within the federal ambit. And more recently, few would doubt that there is a distinct federal interest in eliminating particularly harmful chemicals from interstate commerce, or using chemicals to perpetrate acts of terrorism. But a statute that purported to federalize every malicious use of chemicals, without regard to whether that use has any nexus to a distinct federal interest, would remain a non-starter. When the government candidly conceded that its theory in *Lopez* would permit the criminalization of every assault, *see* Oral Argument Tr. 8–9, *United States v. Lopez*, No. 93-1260 (1994), the argument was effectively over. To accept any theory of federal power that would permit Congress to usurp the core criminal jurisdiction of the States "would require" this Court "to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated." *Lopez*, 514 U.S. at 567.

B. A Treaty Cannot Grant Congress the Very Police Power the Constitution Withholds.

According to the government, these basic limits on federal power are all well and good—unless and until a treaty comes into play. In its view, so long as Congress can point to a treaty that bears some rational relationship to the conduct it wants to regulate, the Constitution's structural constraints pose no limits on what it may do. A federal murder statute might be off-limits, but not if the Senate ratified a convention for the protection of life. In other words, the treaty power stands alone as a blanket exception to the rule that the powers of the federal government "are few and defined," while those of "the State Governments are numerous and indefinite." The Federalist No. 45, at 313 (James Madison) (Jacob E. Cooke ed., 1961). The consequences of that startling proposition are truly breathtaking. It would provide a roadmap for circumventing nearly every limitation on federal power this Court has ever recognized. Never mind that Congress lacks a police power to pass generic criminal laws. Congress could easily acquire such power through any number of human rights treaties.

The same goes for limitations on Congress' ability to abrogate state sovereignty or interfere with state legislative processes. If "federalism principles do not impose a limit" on the power to implement treaties, U.S. Br. in Opp. 23, then nothing prevents Congress from forcing States to enact and implement laws on whatever topic the President, the Senate, and a foreign country deem an appropriate subject for a treaty. *But see New York*, 505 U.S. at 149;

Printz v. United States, 521 U.S. 898 (1997); *NFIB v. Sebelius*, 132 S. Ct. 2566, 2664 (2012) (plurality opinion). Nor would anything prevent Congress from imposing on the States restrictions and conditions designed to enforce and remedy violations of commands the Constitution does not contain. *But see City of Boerne v. Flores*, 521 U.S. 507 (1997); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). Indeed, proponents of the government's sweeping vision of the treaty power promise that it offers all this and more. *See* Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867, 1871–73 & nn.19–25 (2005) (collecting articles arguing that numerous laws held unconstitutional by this Court could be reenacted as treaty-implementing legislation).

These concerns are not hypothetical given the broad modern conception of the proper ambit of international agreements. Treaties may have been an unlikely source for pretensions of plenary federal power back in the framing era, when such agreements were largely limited to discrete topics of international intercourse between nation-states. But "[i]n recent years, the subject matter of treaties and other international agreements has expanded to encompass nearly every part of what used to be considered the exclusive domain of state law." Robert Knowles, *Starbucks and the New Federalism: The Court's Answer to Globalization*, 95 Nw. U. L. Rev. 735, 749–50 (2001). Accordingly, if the government's power to make and implement treaties is as all-encompassing as it insists, this Court's

painstaking efforts to articulate meaningful limits on federal power have all been for naught.

"The obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion). Nothing in the treaty power, the Supremacy Clause, or any other constitutional provision "intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution." *Id.* To the contrary, the Constitution's prohibitions "were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." *Id.* at 17.

This Court has recognized as much from its earliest days. When first confronted with whether a treaty may grant Congress power the federal government otherwise lacks, the Court readily rejected the notion that federal power "can ... be enlarged under the treaty-making power." *City of New Orleans v. United States*, 35 U.S. 662, 736 (1836). Since then, the Court has reiterated that, like all other federal powers, the treaty power is subject to "those restraints which are found in [the Constitution] against the action of the government," *including* "those arising from the nature of the government itself, and of that of the states." *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *see also Holden v. Joy*, 84 U.S. 211, 243 (1873) (treaty power must be exercised consistently "with the nature of our

government and the relation between the States and the United States"); *cf. Jordan v. K. Tashiro*, 278 U.S. 123, 125 (1928) (discussing "possibility of conflict between the exercise of the treaty-making power of the federal government and the reserved powers of the state"). In short, "it is well established that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Boos v. Barry*, 485 U.S. 312, 324 (1988); *Reid*, 354 U.S. at 17–18 (same).

C. *Missouri v. Holland* Does Not Eliminate Federalism Principles as a Constraint on the Treaty Power.

The government concedes, as it must, that the affirmative prohibitions of the Bill of Rights constrain the treaty power, but insists that this Court's decision in *Missouri v. Holland* compels a different rule when it comes to the Constitution's structural provisions. In other words, so long as Congress does not violate the first eight amendments to the Constitution, there is no end to what it may do when seeking to implement a treaty. That contention cannot be reconciled with this Court's pre-*Holland* precedents or even *Holland* itself. Nor can it be squared with this Court's more recent treaty power and federalism cases or, most critically, with the basic structure of our Constitution.

1. *Holland* does not establish the sweeping proposition the federal government attributes to it.

Holland involved a challenge to the Migratory Bird Treaty Act of 1918, a statute enacted to implement a treaty between the United States and Great Britain addressing preservation of migratory birds known to cross the border with Canada. Missouri challenged the Act on its face, arguing that any federal law regulating migratory birds worked "an unconstitutional interference with the rights reserved to the States by the Tenth Amendment," as well as with Missouri's pecuniary interest in birds within its borders. *Holland*, 252 U.S. at 431. In doing so, Missouri focused primarily on assailing the treaty as invalid, and argued that the legislation fell along with the invalid treaty. The Court's opinion rejecting Missouri's challenge likewise focused almost exclusively on the treaty. The Court addressed the statute only as an afterthought: "If the treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432.

The government would read this single sentence as establishing a definitive rule of law: Any legislation rationally implementing a valid treaty is a valid exercise of the Necessary and Proper Clause. But this springing-police-power reading of *Holland* not only conflicts with bedrock constitutional principles; it cannot even be squared with the balance of the opinion. *See Grable & Sons Metal Prods., Inc. v. Darue Eng. & Mfg.*, 545 U.S. 308, 317

(2005) ("an opinion is to be read as a whole"). When the Court turned to the predicate question of whether "the treaty is valid," it acknowledged that the treaty did "not contravene any prohibitory words to be found in the Constitution," but nonetheless went on to consider whether the treaty was "forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Holland*, 252 U.S. at 433–34. The Court did not answer that question with a categorical "no." Rather, the Court considered the relative national and state interests, and it concluded that the "national interest of very nearly the first magnitude" trumped what it viewed as a minimal interest in birds "only transitorily within the State and ha[ving] no permanent habitat therein." *Id.* at 435. Critically, all of that analysis would have been largely beside the point if federalism principles were simply irrelevant when the federal government acts pursuant to the treaty power.

Holland is therefore entirely consistent with the basic principle that Congress' authority depends on the existence of a nexus to a matter of national or international importance. Nothing in *Holland* suggests, let alone compels, that a statute prohibiting the taking of *any* bird—whether migratory or not—would be equally constitutional. Nonetheless, a treaty addressing only migratory birds would be no less valid if implemented through such overinclusive, but hardly irrational, legislation. To be sure, in *Holland*, the Court focused on the validity of the treaty itself, rather than the implementing legislation, but that just mirrored Missouri's litigation strategy, which in turn reflected the tight nexus between the treaty and the legislation. By

focusing on *migratory* birds, both the treaty and the implementing legislation essentially provided their own jurisdictional elements. But it does not follow that any legislation that rationally implements a valid treaty is equally valid, even if it reflects a blatant "disregard of the federal structure of our Government." *Bond*, 131 S. Ct. at 2366–67. That is simply not a question that the *Holland* Court had to confront.[1]

The government's broader reading of *Holland* is flatly inconsistent with the Court's assurance that it was merely applying "established rules to the present case." *Holland*, 252 U.S. at 435. The Court did not purport to overturn earlier decisions holding that the treaty power is subject to those restraints "arising from the nature of the government itself, and of that of the states." *Geofroy*, 133 U.S. at 267. The government's broad reading is also difficult to reconcile with the fact that *Holland* was a 7-2 decision joined by Justice McReynolds, who was hardly known for his expansive conception of federal power. The notion that the Court *sub silentio* overruled cases like *Geofroy* and created a springing-police-power wherein Congress' plenary powers are expanded with each additional valid treaty is simply implausible.

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[1] Relatedly, it is significant that Missouri's challenge to the statute was a facial one. The Court thus did not consider, let alone foreclose, the argument that the statute might impermissibly intrude on state sovereignty in *some but not all* applications.

2. The federal government's reading of *Holland* ignores critical differences between self-executing and non-self-executing treaties.

The government's theory that any valid treaty necessarily expands Congress' plenary power is also difficult to reconcile with the critical distinction between self-executing and non-self-executing treaties, which the Court recently reaffirmed in *Medellin*. In the context of a self-executing treaty, the validity of the treaty itself may well be the proper focus of the judicial inquiry, since the self-executing treaty, if valid, will be the supreme law of the land without any further action by Congress. But non-self-executing treaties are different.

The Senate may ratify a valid non-self-executing treaty with the understanding that state and local governments will ensure that the United States is in compliance with its international treaty obligations. Or the Senate may ratify a non-self-executing treaty with the understanding that existing federal statutes or state laws are sufficient. Indeed, the President and Senate may enter into a treaty on a non-self-executing basis precisely because they are wary of the treaty's federalism implications, and prefer to preserve a role for the States in complying with international obligations that touch upon local matters. *See* Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399, 419–23 (2000). That is not a deficiency in the design of the treaty that renders the treaty itself invalid. It is an appropriate recognition that "[t]he allocation of powers in our federal system

preserves the integrity, dignity, and residual sovereignty of the States." *Bond*, 131 S. Ct. at 2364.

Any inference that the validity of a non-self-executing treaty necessarily renders any rational implementing legislation valid, without regard to the basic structural guarantees and limitations of our Constitution, is therefore unfaithful both to the Constitution and to the very reason some treaties are non-self-executing. This Court recognized as much in *Medellin* when it came to the horizontal separation of powers among the branches of the federal government. The Vienna Convention on Consular Relations is a perfect example of a non-self-executing treaty that depends on state and local laws and authorities for compliance. When local officials in Texas failed to provide consular notification in circumstances that created a breach of our treaty obligations, the President attempted to direct state officials to re-examine the case without obtaining any legislation from Congress. *See Medellin*, 552 U.S. at 503. Without questioning the validity of the underlying treaty or the fact that the United States was in breach of its international obligations, this Court rejected the President's action as inconsistent with the structure of our Constitution. *See id.* at 525 ("The President has an array of political and diplomatic means available to enforce international obligations, but unilaterally converting a non-self-executing treaty into a self-executing one is not among them.").

There is no reason for a different result when it comes to the structural provisions that separate powers vertically between the States and the federal

government. Those vertical structural protections are every bit as vital to our basic constitutional structure. Indeed, the first time this case was before it, this Court invoked horizontal separation-of-powers cases to underscore the liberty-protecting nature of all the structural provisions of the Constitution, whether horizontal or vertical. *Bond*, 131 S. Ct. at 2365. Just as the President has multiple options to implement a valid non-self-executing treaty, but is not empowered to take any action that brings the United States into compliance without regard to the proper division of authority between Congress and the President, there are many options for the United States as a whole to comply with a valid non-self-executing treaty without abandoning bedrock principles of federalism. Simply recognizing that a non-self-executing treaty is valid begins the relevant constitutional analysis of any implementing legislation, but it does not end it.

3. If *Holland* does eliminate federalism as a check on the treaty power, it should be overruled.

In all events, if *Holland* really does establish the remarkable proposition that Congress' power to implement treaties is immune from the Constitution's structural constraints, it cannot be reconciled with subsequent developments in this Court's jurisprudence and should be overruled. *Reid v. Covert* explicitly rejected the notion that an "agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." 354 U.S. at 16. The government would confine *Reid*

to the affirmative restrictions on government power included in the Bill of Rights. But that distinction makes no sense in light of the critical liberty-protecting nature of the Constitution's structural provisions. Indeed, any effort to distinguish between "individual rights" and the Constitution's structural provisions cannot be reconciled with the earlier decision in this case or a host of other precedents.

The government's purported distinction rests on the mistaken belief "that the only, or even the principal, constraints on the exercise of congressional power are the Constitution's express prohibitions." *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring). In fact, far from being second-class citizens, the structural provisions are among the most important and liberty-protecting provisions in our founding document. "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *Bond*, 131 S. Ct. at 2364; *see also Morrison*, 529 U.S. at 616 n.7 ("the Framers crafted the federal system of Government so that the people's rights would be secured by the division of power"). That is why "the Framers considered *structural* protections of freedom the most important ones," and why "they alone were embodied in the original Constitution and not left to later amendment." *NFIB*, 132 S. Ct. at 2676–77 (joint dissent) (emphasis added); *see also id.* at 2577–78 (Roberts, C.J.) ("the Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government").

This Court has therefore repeatedly rejected the notion that the first eight amendments to the Bill of Rights are the only limits on the federal powers the Constitution enumerates. The statutory provisions addressed in cases such as *Lopez*, *New York*, *Printz*, *Morrison*, and *NFIB* were unconstitutional because they were "inconsistent with the federal structure of our Government." *New York*, 505 U.S. at 177; *see also, e.g.*, *Lopez*, 514 U.S. at 567 (rejecting theory of federal power that "would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated"); *Printz*, 521 U.S. at 935 (rejecting theory of federal power as "fundamentally incompatible with our constitutional system of dual sovereignty"). As these and other cases make clear, the cardinal canon that "[i]mpermissible interference with state sovereignty is not within the enumerated powers of the National Government" informs the scope of *all* federal powers. *Bond*, 131 S. Ct. at 2364. There is no principled basis for treating the power to implement treaties any differently.

Indeed, if anything, the Constitution's structural constraints should apply with *more* force when determining the contours of Congress' power to implement treaties. This Court has long recognized that "the power is nowhere in positive terms conferred upon [C]ongress to make laws to carry the stipulations of treaties into effect." *Prigg v. Pennsylvania*, 41 U.S. 539, 619 (1842). Congress must derive that power from one of its enumerated powers. To be sure, a valid non-self-executing treaty may alter the scope of what legislation is necessary and proper, just as valid commerce power legislation

might allow Congress to enact a record-keeping requirement under the Necessary and Proper Clause that it would otherwise lack the authority to impose. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 35 (2005) (Scalia, J., concurring). But that does not remotely mean that the Necessary and Proper Clause grants Congress carte blanche to implement any valid non-self-executing treaty. To the contrary, the Necessary and Proper Clause does not empower Congress to enact laws that "undermine the structure of government established by the Constitution." *NFIB*, 132 S. Ct. at 2592 (Roberts, C.J.); *see also Printz*, 521 U.S. at 923–24 (a law that "violates the principle of state sovereignty reflected in the various constitutional provisions ... is not a 'La[w] ... *proper* for carrying into Execution'" that power).

Legislation prohibiting the taking of any bird—migratory or not—might be a rational (albeit overinclusive) means of implementing a migratory bird treaty, and it might be a perfectly fine means for a co-signatory with a different constitutional system to implement the treaty. But it would not be "proper" legislation under our Constitution. It would be both extraordinary and utterly inconsistent with this whole line of post-*Holland* precedent if a power that concededly cannot be used to circumvent the prohibitions in the first eight amendments nonetheless could be employed to obliterate the most basic structural constraints in the unamended Constitution, the importance of which the Ninth and Tenth Amendments only underscored.

In fact, the Solicitor General previously appeared to recognize as much. In *Golan v. Holder*, the Court

was asked to consider whether, in order to bring the United States into compliance with certain treaties, Congress could provide copyright protection for certain works. Notwithstanding arguments by *amici* that Congress could invoke the treaty power and the Necessary and Proper Clause to enact the challenged statute, the Solicitor General relied solely on the Copyright Clause. *See* Br. for United States, *Golan v. Holder*, No. 10-545 (Aug. 3, 2011). And in response to this Court's questions, the Solicitor General "completely agree[d]" with the principle that "a treaty [cannot] expand the powers of the Federal Government." Oral Argument Tr. 31:21–32:10, *Golan v. Holder*, No. 10-545 (2011).

The Solicitor General was right then and is wrong now. A federal power to implement treaties unconstrained by the Constitution's structural protections of liberty is incompatible with our founding document. In this context as in all others, "the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for" the judiciary "to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). This Court recognized as much when it vindicated petitioner's right "to object that her injury results from disregard of the federal structure of our Government." *Bond*, 131 S. Ct. at 2366–67.

In the process, the Court refused to accept the efforts of the government and the Court-appointed *amicus* to limit standing to certain kinds of structural claims or, alternatively, to treat the treaty

power as categorically different from other constitutional powers. The Court wisely rejected those arguments then and should do the same now. Some principles—such as the notions that ours is a limited federal government and that individuals have standing to insist that those limits be honored—are too important to admit of exceptions. A valid non-self-executing treaty, like any valid legislative agenda, can be implemented either constitutionally or in a manner that is not proper in light of our most basic constitutional structure. It is not at all clear that *Holland* is to the contrary. But if *Holland* really stands for the proposition that any legislation that rationally implements a valid non-self-executing treaty is perforce constitutional, then *Holland* is incompatible with more recent precedents and the Constitution, and it should be overruled.

D. As in Other Contexts, the Presence or Absence of a Jurisdictional Element Informs the Constitutionality of Treaty-Implementing Legislation.

Because the federal government does not have plenary authority to implement any valid treaty, legislation designed to implement a non-self-executing treaty is subject to the same basic constraints and rules of construction as other federal legislation. Particularly given the breadth of the power to enter into treaties, absent meaningful limits on the power to implement them, nothing would stop Congress from invoking treaties to override large swathes of state and local law, including family law, garden-variety criminal law, and even the sensitive decision whether to retain the death penalty. *See*

Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 400–09 (1998). That kind of plenary power would vastly outstrip Congress' enumerated powers and violate the principle, "deeply ingrained in our constitutional history," "that 'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States." *Morrison*, 529 U.S. at 618 n.8 (quoting *New York*, 505 U.S. at 155).

When faced with other broad assertions of near-plenary power, this Court has emphasized that the best way for Congress to prevent federal legislation from exceeding the scope of federal power is by including a "jurisdictional element which would ensure, through case-by-case inquiry," that the conduct it seeks to regulate bears a meaningful nexus to the distinctly federal interest it seeks to advance. *Lopez*, 514 U.S. at 561. That kind of jurisdictional element not only provides a ready means of confirming that each application of a statute is within the proper confines of federal power, but also assures courts that Congress "has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *Bass*, 404 U.S. at 349. In that respect, jurisdictional elements help prevent courts from needlessly confronting constitutional questions Congress may have intended to avoid. Conversely, by including jurisdictional elements that limit statutes to contexts that clearly implicate a national or international interest, Congress can convert what would otherwise be difficult constitutional questions for the courts into straightforward cases. Moreover, the very process of

articulating a jurisdictional element helps remind Congress to pause and consider the federalism implications of its actions before adopting laws that push the bounds of federal power.

In recognition of the critical role jurisdictional elements play when it comes to cabining congressional statutes to matters of genuinely national or international concern, this Court has placed particular emphasis on the absence of jurisdictional elements when holding federal statutes unconstitutional. *See, e.g.*, *Lopez*, 514 U.S. at 561 ("§ 922(q) contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce"); *Morrison*, 529 U.S. at 613 ("§ 13981 contains no jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce"). Moreover, where Congress has included a jurisdictional element, this Court has often focused on the language of the jurisdictional element and construed it to provide a *meaningful* nexus to the federal interest. *See, e.g.*, *Jones*, 529 U.S. at 855 (interpreting federal arson statute that reached buildings "used" in interstate commerce as requiring "active employment for commercial purposes, and not merely a passive, passing, or past connection to commerce"). Thus, by omitting a jurisdictional element, Congress deprives courts of a ready opportunity to apply a narrowing construction to language that expressly addresses the statute's scope.

The same principles developed to cabin the potentially expansive commerce power should apply with full force when considering the constitutionality of treaty-implementing legislation. The best way to ensure that such laws stay within the bounds of federal power is to include a jurisdictional element requiring that the conduct a statute reaches bear a meaningful nexus both to the treaty Congress seeks to implement and to the national interest the treaty seeks to advance. Of course, the nature of the treaty may inform the nature of the jurisdictional element. Legislation implementing an international commercial treaty may include a jurisdictional element that looks very much like the classic jurisdictional element under Commerce Clause legislation, only with a requirement that an item have moved in international commerce. In other cases, the subject of the treaty and resulting implementing legislation may effectively provide its own jurisdictional element. Legislation affecting only international borders or international adoptions will be self-limiting.

But given the broad ambit of modern treaties, this will not always be the case. And particularly when Congress invokes a treaty to regulate the domestic conduct of individuals within our borders, the mere ability to conceive of a rational relationship between a statute and a treaty is manifestly insufficient to "ensure, through case-by-case inquiry," that each application of the statute advances the same distinctly national interest as the treaty it purports to implement. *Lopez*, 514 U.S. at 561. Nor, as this case amply demonstrates, is prosecutorial

discretion an adequate substitute for such a jurisdictional element.

II. Section 229 Need Not And Should Not Be Construed To Reach Petitioner's Conduct.

The government does not appear to contend that Congress possesses a general police power or could ordinarily criminalize every malicious poisoning in the Nation. Nonetheless, in the government's view, because Congress enacted section 229 to implement the Chemical Weapons Convention, the ordinary rules do not apply. Indeed, the government resists any effort to narrow section 229 to circumstances that, unlike this case, implicate the distinct national and international concerns addressed by the Convention. But as demonstrated, the normal rules do apply even when Congress acts to implement a valid non-self-executing treaty, and those rules clearly suggest a narrowing construction that could save section 229 from invalidation. The alternative to that saving construction is not, as the government suggests, new plenary power for Congress, but the invalidation of section 229 as applied.

A. Settled Canons of Statutory Construction Counsel Against Reading Section 229 To Apply to Petitioner's Conduct.

It is a "cardinal principle" of statutory construction that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Fla. Gulf*

Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988). This rule "not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that" courts should not "lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.* To pass muster in the constitutional avoidance context, an alternative construction need not be the most obvious one; instead, "every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895).

Constitutional avoidance principles apply with all the more force when determining whether a statute should be construed to "alter the usual constitutional balance between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). Because the Constitution reserves the police power to the States, courts "will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction," or to authorize "a substantial extension of federal police resources." *Bass*, 404 U.S. at 349, 350. Accordingly, "'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance' in the prosecution of crimes." *Jones*, 529 U.S. at 858 (quoting *Bass*, 404 U.S. at 349); *see also Gregory*, 501 U.S. at 461. The familiar principle that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity" also compels a similar clear statement rule, especially when federalism interests are at stake.

Cleveland v. United States, 531 U.S. 12, 25 (2000). When a "choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate," before the Court "choose[s] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Jones*, 529 U.S. at 858.

There can be no serious dispute that the constitutional question here is grave, as it cuts to the very heart of the principle that the powers of our federal government are few and enumerated. Nor can there be any serious dispute that the government's sweeping interpretation would render section 229 a dramatic intrusion on "the integrity, dignity, and residual sovereignty of the States." *Bond*, 131 S. Ct. at 2364. The statute presumptively defines "chemical weapon" to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." 18 U.S.C. § 229F(8)(A). If, as the government insists, section 229 makes every substance that satisfies this exceptionally broad definition a "chemical weapon" whenever used with malicious intent, then the statute turns every "kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." Pet.App.10 n.7. As Justice Alito memorably remarked at oral argument, the government's reading would render vinegar a chemical weapon when deployed to injure a neighbor's goldfish. Oral Argument Tr. 29:15–30:9, *Bond v. United States*, No. 09-1227 (2011).

And the statute would not stop with federalizing the use of "chemical weapons" so defined. It would also make it a federal crime to "own" or "possess" common chemicals with malicious intent, 18 U.S.C. § 229(a)(1), something the Convention itself does not require, *see* Conv. Art. I. Federal possessory crimes are rare and are typically reserved for exceedingly dangerous substances or materials, and/or include an explicit jurisdictional element. *See, e.g.*, 18 U.S.C. § 175(a) (biological weapons); *id.* § 831 (nuclear material); *id.* § 842(n)(1) (certain plastic explosives); *id.* § 2252(a)(4)(B) (child pornography produced with materials shipped in interstate commerce); 16 U.S.C. § 668(a) (bald and golden eagles).[2] Here, by contrast, the government's reading could make it a federal crime to possess bleach or insect repellant while harboring a bad intent. And anyone who aided the malicious use or possession of bleach would be liable not for aiding and abetting a state-law crime, but for material support of terrorism, which carries a potential 15-year term. 18 U.S.C. § 2339A. Finally, the government's view would make every poisoning or assault involving a harmful substance a candidate for the federal death penalty when it results in the loss of human life, thereby overriding the States' traditional prerogative to determine whether to permit the death penalty for all but a narrow category of crimes with an obvious federal nexus.

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[2] Some of these statutes are in need of narrowing constructions of their own. If the government applies the same overbroad approach to section 175(a), which implements the Biological Weapons Convention, then someone with a head cold who maliciously spits on another has deployed a biological weapon.

This case vividly illustrates the severe intrusion on core state prerogatives that results. Petitioner was prosecuted for seeking to exact revenge on a romantic rival by spreading small amounts of legally available substances on surfaces of property her rival might touch. Had this quintessentially local crime been left to state law enforcement, petitioner likely would have faced a prison sentence of, at most, 25 months. Instead, she was sentenced to six years in federal prison for violating a statute that purports to implement a treaty to eradicate chemical weapons. The federal government did not prosecute petitioner on the theory that her actions harmed or even had the potential to harm any distinctly federal interest—whether within or without the scope of the Chemical Weapons Convention. Indeed, no one has ever suggested that this case amounts to anything more than a local, domestic dispute. It is difficult to conceive of a federal prosecution that more "dramatically intrudes upon traditional state criminal jurisdiction." *Bass*, 404 U.S. at 350.

B. Congress Enacted Section 229 To Target the Deployment of Chemical Weapons by Terrorists, Not To Upset the Federal-State Balance.

Nothing in section 229 provides anything close to the requisite "clear and manifest" statement that Congress intended to revolutionize the federal-state balance in this manner. *Gregory*, 501 U.S. at 461. The statute contains no indication that Congress "in fact faced, and intended to bring into issue," *Bass*, 404 U.S. at 349, the constitutional implications of

federalizing all manner of poisoning and assault crimes throughout the Nation.

This indication is wholly lacking for the straightforward reason that Congress had no such intent. Rather, it intended to implement the Convention's direction to criminalize actions that would violate the Convention if undertaken by nation-states. Needless to say, nation-states do not poison romantic rivals. But individuals can use chemical weapons in the warlike manner that threatens widespread injury and would squarely implicate the Convention if so used by a nation-state—namely, to commit acts of terrorism. And Congress clearly intended section 229 to reach acts of terrorism, not every malicious use of chemicals.

That is true not just in the vague sense that Congress considered the statute a useful tool in the federal government's arsenal against terrorist activities. In Congress' view, a violation of section 229 is a crime of terrorism. Congress' treatment of the statute in other provisions of the U.S. Code leaves no room for doubt about that. Most obviously, section 229 is one of the very few underlying offenses listed in the federal statutes that prohibit "harboring or concealing terrorists" and "providing material support to terrorists." 18 U.S.C. §§ 2339, 2339A. There is no requirement in these statutes that the underlying section 229 offense satisfy the definition of terrorism set forth in 18 U.S.C. § 2331; the material support statutes are triggered automatically any time an individual provides material support to or harbors or conceals someone who has violated or intends to violate section 229. Congress thus

apparently considered *every* violation of section 229 a per se crime of terrorism.

The statutory history of section 229 reinforces that conclusion. As noted above, section 229 was not Congress' first effort to prohibit the use of chemical weapons. Congress enacted a similar prohibition two years earlier. *See* 18 U.S.C. § 2332c (1996). That earlier provision, which defined a chemical weapon as "any weapon that is designed or intended to cause widespread death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals or precursors of toxic or poisonous chemicals" and contained harsh penalties very similar to those found in section 229, was housed exactly where one might expect: in the "Terrorism" chapter of Title 18. When Congress enacted section 229, it repealed section 2332c and replaced references to section 2332c in the terrorism laws with references to section 229. In doing so, Congress made plain its understanding that section 229 was directed at the kind of widespread dissemination of chemical weapons that would violate the Convention if undertaken by a nation-state, not mine-run poisonings and thumb burns.

Congress' treatment of section 229 in other contexts confirms the same focus on targeting widespread dissemination of chemical weapons, not disrupting the federal-state balance. For instance, section 229 is cross-referenced in the statute that prohibits acts of terrorism that transcend national boundaries, 18 U.S.C. § 2332b, and is one of only three laws for which "[t]he Secretary of Defense, upon the request of the Attorney General, may

provide assistance ... during an emergency situation involving a weapon of mass destruction" (the other two being biological weapons and weapons of mass destruction statutes). 10 U.S.C. § 382(a); *see also* 18 U.S.C. § 229E (permitting Attorney General to request Secretary of Defense's assistance in enforcing section 229 in "an emergency situation involving a chemical weapon"). Congress also defined "weapon of mass destruction" to include "any weapon that is designed or intended to cause death or serious bodily injury through the release, dissemination, or impact of toxic or poisonous chemicals, or their precursors." *Id.* § 2332a(c)(2).

As this case vividly illustrates, the government's sweeping construction of the statute therefore produces patently absurd results. No one thinks that petitioner's conduct implicated the concerns of the Convention. The notions that our co-signatories were carefully watching to ensure that petitioner was brought to justice and that otherwise the United States would have shirked its obligations under the Convention are nothing short of absurd. It is equally implausible to characterize petitioner's conduct as an act of terrorism. Yet, under the government's theory, had petitioner enlisted the aid of a friend in her misguided scheme, that friend could have been convicted of providing material support to a terrorist and sentenced to 15 years in prison. *See id.*

To be sure, if Congress really enacted a statute that rendered every malicious use of chemicals nationwide not just a federal offense but a crime of terrorism, this Court would have no choice but to hold the statute unconstitutional. But here there is

an available construction that avoids constitutional difficulties and comports with Congress' intent to reach conduct that implicates the Convention and merits the label "terrorism." As is often the case, Congress could have written a statute that better captured its intent, but given the manifest constitutional difficulties with the government's reading of section 229, the question is not what is the best reading of the statute, but whether a saving construction is fairly available. As demonstrated next, section 229 can be interpreted to cast a much narrower net than it would under the government's boundless interpretation.

C. The Statute's "Peaceful Purposes" Provision Must Be Construed Sensibly To Effect Congress' Intent.

When faced with a statute that, read broadly, would "effect a significant change in the sensitive relation between federal and state criminal jurisdiction" that Congress did not contemplate, this Court has not hesitated to adopt reasonable limiting constructions to avoid both unintended consequences and difficult constitutional questions that otherwise would result. *Bass*, 404 U.S. at 350; *see also, e.g.*, *Jones*, 529 U.S. at 850 (construing arson statute not to "render the 'traditionally local criminal conduct' in which" defendant had engaged "a matter for federal enforcement"). Section 229 is readily susceptible of a construction that achieves both objectives.

The key to giving section 229 a sensible scope lies in its definitional provisions. The statute presumptively defines a "chemical weapon" as a "toxic chemical," which it in turn broadly defines as

"any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." 18 U.S.C. § 229F(8)(A). Importantly, however, a substance within the broad class of "toxic chemicals" is deemed a "chemical weapon" only when "intended for a purpose not prohibited under this chapter." *Id.* § 229F(1)(A). And the statute defines "purposes not prohibited by this chapter" as, *inter alia*, "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." *Id.* § 229F(7)(A).

The best—indeed, the *only*—way to harmonize section 229 with Congress' manifest intent is to interpret the term "peaceful purpose" as confining the statute's application to non-warlike activities. In other words, the statute should be construed to reach only activities undertaken for the purposes Congress has identified as sufficient to turn an ordinary crime into the kind of warlike, terrorist conduct in which a nation-state could engage, and that the Convention prohibits. That interpretation of "peaceful purposes" avoids consequences Congress could not conceivably have intended and prevents the statute from exceeding the scope of the Convention it was enacted to implement.

"Peaceful purpose" is a not a phrase frequently found in the U.S. Code. In fact, it appears only in a handful of provisions, most of which have one thing in common: They deal with actions of the United States and its relations with other nations in the realm of resources and scientific advancements with the potential to be used to perpetrate acts of war.

See, e.g., 22 U.S.C. §§ 3201, 3221, 3242 & 42 U.S.C. §§ 2153b, 2164, 2295 (establishing policies regarding use and exchange with other nations of nuclear material for "peaceful purposes"); 51 U.S.C. §§ 20102, 70901 (establishing policies regarding activities in space for "peaceful purposes"); 50 U.S.C. § 1520a (permitting Secretary of Defense to test or experiment with chemical and biological agents for a "peaceful purpose"). In that common foreign-relations context, the term is used not to distinguish between malicious and peaceful conduct, but to draw a more general distinction between conduct that is warlike and conduct that is not.

The same focus on differentiating between the warlike and non-warlike conduct of nation-states underlies the "peaceful purpose" provision of section 229F(7). Like most provisions of the Act, section 229F is patterned after a provision of the Convention itself (albeit with a few significant alterations). Its terms are thus best understood by reference to how they are used in the Convention, which is to govern the conduct of *nation-states*, not individuals. The treaty obligation Congress sought to implement underscores this focus on the conduct of nation-states: The Convention requires the United States not to enact particular laws targeting the conduct of individuals, but to prohibit individuals within its jurisdiction from "undertaking any activity *prohibited to a State Party* under th[e] Convention." Conv. Art. VIII(1)(a) (emphasis added). This provision reflects the obvious reality that the Convention was directed at chemical weapons and warfare; it was not a global convention to adopt

uniform punishments for poisonings or eliminate all assaults involving chemicals.

Indeed, it is clear on the face of Article II(9), the provision from which section 229 is derived, that its terms were crafted to govern the conduct of nation-states, not individuals. Article II(9) declares among the "purposes not prohibited by the Convention" the use of toxic chemicals for the kinds of thing a nation-state would typically do, such as "military" or "law enforcement" activities. Because Congress took the term "peaceful purposes" directly from Article II(9), the term is therefore best interpreted by reference to what it means for a nation-state to use toxic chemicals for "peaceful purposes." In that context, the most natural reading of "peaceful purposes" is the traditional one: non-warlike. *See Shorter Oxford English Dictionary* 2128–29 (5th ed. 2002) (defining "peace" or "peaceful" as "freedom from ... war or hostilities"); *The American Heritage College Dictionary* 1005 (3d ed. 1997) (same). Accordingly, section 229F(7) is best understood as preventing individuals from engaging in the kinds of warlike activities that the Convention prohibits a signatory state from undertaking.[3]

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[3] That understanding of "peaceful purposes" as focused on the warlike conduct of nation-states is also consistent with the term's use in other international agreements. *See, e.g.*, Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. IV, Jan. 27, 1967, 18 U.S.T. 2410, http://www.state.gov/t/isn/5181.htm ("The Moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes."); Antarctic Treaty art. I, § 1, Dec. 1, 1959, 12 U.S.T. 794, http://www.nsf.gov/od/opp/antarct/

While one might object that construing "peaceful purposes" as "non-warlike" creates difficult questions about what conduct section 229 prohibits, related provisions of the U.S. Code help to avoid any ambiguity. Congress has focused quite specifically on what motivations render the conduct of individuals more akin to warlike actions of nation-states. And Congress identified those purposes explicitly in its statutory definition of terrorism: An otherwise ordinary crime becomes an act of terrorism when intended "to intimidate or coerce a civilian population," "to influence the policy of a government by intimidation or coercion," or "to affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331. As that definition makes clear, not every violent or malicious crime is sensibly construed as an act of terrorism. A crime of terrorism instead must involve the sort of warlike conduct or motivations traditionally considered the prerogative of nation-states.

One might also object that using Congress' definition of terrorism to inform the meaning of "peaceful purposes" in section 229(F) is inconsistent with Congress' decision to treat section 229 as a per se crime of terrorism and to replace former 18 U.S.C. § 2332c with section 229. But while it is clear that

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anttrty.jsp ("Antarctica shall be used for peaceful purposes only."); Agreement Concerning Cooperation on the Civil International Space Station art 14, § 1, Jan. 29, 1998, ftp://ftp.hq.nasa.gov/pub/pao/reports/1998/IGA.html ("The Space Station ... shall remain a civil station, and its operation and utilization shall be for peaceful purposes, in accordance with international law.").

Congress intended to supplant 18 U.S.C. § 2332c with a provision that more closely resembled the approach and language of the Convention, there is absolutely no indication that Congress intended to radically expand the prohibition to capture every malicious use of chemicals, including those, like petitioner's, that bear no resemblance to a crime of terrorism. Petitioner's suggested construction is true to Congress' intent and avoids grave constitutional difficulties. And the government's alternative is no alternative at all. The government would read the broad terms for all they are worth and the term "peaceful purposes" narrowly, with the result being that every malicious use of chemicals—even vinegar deployed against a neighbor's goldfish—becomes a federal crime, and every overt act in furtherance constitutes material support of terrorism.

In other words, the fundamental problem with the government's reading of section 229 is that it deprives the statute of anything remotely resembling a "jurisdictional element which would ensure, through case-by-base inquiry," some connection to a distinctly federal interest. *Lopez*, 514 U.S. at 561. Despite Congress' evident intent to reach only conduct that would violate the Convention if undertaken by nation-states and would justify treating section 229 as a per se crime of terrorism, the government would read it as reaching all manner of poisonings and assaults. As noted, this Court has recognized the usefulness of jurisdictional elements as ensuring that a statute applies only where Congress intended and the Constitution permits. And the Court has not hesitated to strike down statutes that reached too broadly in the absence of a

jurisdictional element. Unlike the government's sweeping reading of the statute, petitioner's saving construction locates a jurisdictional element in section 229(F)'s reference to "peaceful purposes." With that jurisdictional element, section 229 is clearly constitutional. Without it, the statute is just as clearly unconstitutional.

That understanding also renders the statute far more compatible with the treaty it was enacted to implement. The Convention treats chemical weapons as equivalent to "weapons of mass destruction" and refers on multiple occasions to the use of various chemicals "as a method of warfare." Conv. Preamble, Art. I. It contains provisions requiring the "destruction" and "coercive verification" of chemical weapons, and obligates the United States to open its borders to international inspectors to ensure compliance with its terms. *See, e.g.*, Conv. Art. I(2), Art. III, Conv. Verification Annex Part XI. These provisions would make no sense if common household chemicals became "chemical weapons" whenever used with malicious intent. Indeed, it trivializes the concept of chemical weapons and the important work of the Convention to conflate a domestic dispute that happens to involve harmful chemicals with the use of chemical weapons of mass destruction to coerce a civilian population or government.

In short, Congress certainly understands the difference between regulating the use of chemical weapons to perpetrate acts of terrorism and regulating every malicious use of harmful substances in the Nation. Section 229 reflects Congress' attempt to do the former, and leave the latter where it has

always been: in the hands of the States. Petitioner's actions may have been malicious, but they were not warlike, and they are not sensibly covered by a statute designed to implement an international obligation to prohibit individuals from engaging in the kind of warlike conduct in which a nation-state could engage. This Court should not lightly assume that Congress intended to equate exacting revenge on a romantic rival with stockpiling chemical weapons to use against a foreign nation or a civilian population when it approached the delicate task of translating the Convention's prohibitions on nation-states into meaningful prohibitions for individuals.

III. If The Statute Cannot Be Construed To Avoid The Question, It Is Unconstitutional As Applied To Petitioner.

If section 229 in fact sweeps as broadly as the government insists, then it is unconstitutional as applied to petitioner. While the federal government certainly has the power to criminalize many misuses of chemicals, it lacks the power to criminalize every malicious use of chemicals. Only a government with police power could reach that far. The ratification of the Chemical Weapons Convention did not and cannot change that basic reality. The Convention may empower Congress to enact some legislation that would not be necessary or proper without it, but the agreement of the Senate, the President, and a foreign nation is not enough to grant Congress the police power. To the extent section 229 cannot be construed so as not to reach a domestic dispute that culminated in a thumb burn, it is plainly unconstitutional. If section 229 really extends that

far, it is not justified by the Necessary and Proper Clause or any other grant of congressional authority. It is not necessary because the Convention does not require or even contemplate it, and it is not proper because a federal police power is antithetical to our basic constitutional structure.

The government can bring petitioner's conduct within the ambit of section 229 only by depriving the statute of any semblance of a jurisdictional element that would limit the statute to conduct that implicates the Convention and is within Congress' power to reach. But in doing so, the government renders the statute so wildly "out of proportion to" the Convention "that it cannot be understood as" a meaningful, let alone constitutional, effort to implement it. *Boerne*, 521 U.S. at 532. The Convention obligates the United States to prohibit "natural and legal persons ... from undertaking any activity prohibited to a State Party under this Convention." Conv. Art. VII(1). The government has never suggested that petitioner's conduct implicated this obligation. To the best of petitioner's knowledge, the United States has seen no need to report this incident to other signatory states, to establish a plan for destroying the substances petitioner used, or to open our borders to international inspectors to make sure no comparable incidents occur again. *See, e.g.*, Conv. Arts. I(2), IV, IX.

That is because no one could seriously contend that the use of harmful chemicals to exact revenge on a romantic rival is the kind of activity that would violate the Convention if undertaken by a signatory state. Indeed, the very idea is non-sensical. Widely

disseminating chemicals to induce fear in a civilian population is something both a signatory state and a terrorist could do. Poisoning romantic rivals is the exclusive province of individuals, and punishing such misconduct should be the province of the States. The Convention and its signatories are indifferent to whether petitioner is answerable for her misconduct.

Moreover, even if the Convention were not wholly indifferent to petitioner's misconduct, it is expressly indifferent to whether it is addressed by state or federal authorities. The Convention states that each signatory "shall, *in accordance with its constitutional processes*, adopt the necessary measures to implement its obligations under th[e] Convention." Conv. Art. VII(1). If the Convention really did require signature states to ban every malicious use of harmful chemicals, it still would not obligate Congress to act, let alone to do so inconsistently with our "constitutional processes." Pennsylvania has not decriminalized the malicious use of chemicals. *See, e.g.*, 18 Pa. Cons. Stat. § 2701 (prohibiting simple assault); *id.* § 2702 (prohibiting aggravated assault); *id.* § 2709 (prohibiting harassment). Nothing in the Convention obligates Congress to layer federal laws on top of existing state ones. Indeed, nothing in the Convention obligates *Congress* to do anything at all. In keeping with the settled norm that "[a] federal state may leave implementation" of a treaty "to its constituent units," Restatement (Third) of Foreign Relations Law § 321 cmt. b (2012), the Convention is agnostic as to whether the United States implements these obligations through federal or state law.

The government's current insistence that the Convention empowers Congress to intrude on the States' core criminal jurisdiction thus flies in the face of the President's and the Senate's effort to negotiate and ratify a non-self-executing treaty that is respectful of our federalist system and the differing constitutional processes of other nations. Section 229 might be perfectly rational, albeit substantially overbroad, implementing legislation for a nation without a federalist structure. But the implementation of a non-self-executing treaty, especially one that expressly directs signatories to implement the treaty in conformity with their own varied systems, is no excuse for short cuts that do not respect the structural limitations imposed by our Constitution. *See, e.g.*, *Medellin*, 552 U.S. at 525–26.

None of this leaves Congress bereft of power to implement valid treaties. Congress' power is not plenary, but especially when it comes to more traditional topics of international agreements, it is formidable. Congress possesses a variety of enumerated powers through which it may implement the Convention's requirements. *See, e.g.*, U.S. Const. art. I, § 8, cl. 10 (power "[t]o define and punish ... Offenses against the Law of Nations"), cl. 14 (power "[t]o make Rules for the Government and Regulation of the land and naval Forces"), cl. 3 (power "[t]o regulate Commerce with foreign Nations, and among the several States"). But to the extent this or any other treaty might obligate the United States internationally to reach conduct that falls outside of Congress' regulatory sphere, the answer is not to expand Congress' power beyond the Framers' design to fill the gap. Rather, the answer is to assume that

the President and the Senate chose to leave the federal-state balance intact and allow a combination of federal and state law to ensure that the United States can fulfill its international obligations.

Because the Convention includes a direction to implement consistent with, not in derogation of, each signatory state's constitutional processes, the government is left to argue that, in our constitutional system, a valid non-self-executing treaty grants Congress a plenary power to regulate all conduct that bears a rational relationship to the treaty. For all the reasons already explained, that contention is fundamentally incompatible with the Constitution and this Court's precedents. *Missouri v. Holland* does not establish that proposition, but if it did, it could not be reconciled with more recent decisions that respect our basic constitutional structure. Neither any clause of the Constitution alone nor all of them in combination grants Congress that kind of police power. And the last place such plenary power lies inchoate, waiting to be unleashed by a ratified treaty, is the Necessary and Proper Clause. An unchecked power to implement treaties would amount to exactly the sort of "great substantive and independent power" that the Necessary and Proper Clause cannot supply. *McCulloch v. Maryland*, 17 U.S. 316, 411 (1819); *see also NFIB*, 132 S. Ct. at 2591–92 (Roberts, C.J.).

The Constitution provides a mechanism for its amendment, U.S. Const. art. V, and the treaty power is not it. In an era where treaties extend far beyond the traditional notions of intercourse between nation-states and cover nearly every exercise of government

power imaginable, the treaty power the government envisions would "obliterat[e] the Framers' carefully crafted balance of power between the States and the National Government." *Morrison*, 529 U.S. at 620. At bottom, a treaty simply cannot invest Congress with the very police power the Constitution withholds. To hold otherwise would be "to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated." *Lopez*, 514 U.S. at 567.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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STATUTORY APPENDIX

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U.S. Const. art. I, § 8, cl. 18
Necessary & Proper Clause

The Congress shall have Power ... To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. II, § 2, cl. 2
Treaty Clause

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. amend. X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

18 U.S.C. § 229
Prohibited Activities

(a) UNLAWFUL CONDUCT.—Except as provided in subsection (b), it shall be unlawful for any person knowingly—

(1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or

(2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1).

(b) EXEMPTED AGENCIES AND PERSONS.—

(1) IN GENERAL.—Subsection (a) does not apply to the retention, ownership, possession, transfer, or receipt of a chemical weapon by a department, agency, or other entity of the United States, or by a person described in paragraph (2), pending destruction of the weapon.

(2) EXEMPTED PERSONS.—A person referred to in paragraph (1) is—

(A) any person, including a member of the Armed Forces of the United States, who is authorized by law or by an appropriate officer of the United States to retain, own, possess, transfer, or receive the chemical weapon; or

(B) in an emergency situation, any otherwise nonculpable person if the person is attempting to destroy or seize the weapon.

(c) JURISDICTION.—Conduct prohibited by subsection (a) is within the jurisdiction of the United States if the prohibited conduct—

(1) takes place in the United States;

(2) takes place outside of the United States and is committed by a national of the United States;

(3) is committed against a national of the United States while the national is outside the United States; or

(4) is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States.

18 U.S.C. § 229A
Penalties

(a) CRIMINAL PENALTIES.—

(1) IN GENERAL.—Any person who violates section 229 of this title shall be fined under this title, or imprisoned for any term of years, or both.

(2) DEATH PENALTY.—Any person who violates section 229 of this title and by whose action the death of another person is the result shall be punished by death or imprisoned for life.

(b) CIVIL PENALTIES.—

(1) IN GENERAL.—The Attorney General may bring a civil action in the appropriate United States district court against any person who violates section 229 of this title and, upon proof of such violation by a preponderance of the evidence, such person shall be subject to pay a civil penalty in an amount not to exceed $100,000 for each such violation.

(2) RELATION TO OTHER PROCEEDINGS.—The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is available by law to the United States or any other person.

(c) REIMBURSEMENT OF COSTS.—The court shall order any person convicted of an offense under subsection (a) to reimburse the United States for any expenses incurred by the United States incident to the seizure, storage, handling, transportation, and destruction or other disposition of any property that

was seized in connection with an investigation of the commission of the offense by that person. A person ordered to reimburse the United States for expenses under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered under this subsection to reimburse the United States for the same expenses.

18 U.S.C. § 229F
Definitions

In this chapter:

(1) CHEMICAL WEAPON.—The term "chemical weapon" means the following, together or separately:

(A) A toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.

(B) A munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in subparagraph (A), which would be released as a result of the employment of such munition or device.

(C) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in subparagraph (B).

(2) CHEMICAL WEAPONS CONVENTION; CONVENTION.—The terms "Chemical Weapons Convention" and "Convention" mean the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993.

(3) KEY COMPONENT OF A BINARY OR MULTICOMPONENT CHEMICAL SYSTEM.—The term "key component of a binary or multicomponent chemical system" means the precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly

with other chemicals in the binary or multicomponent system.

(4) NATIONAL OF THE UNITED STATES.—The term "national of the United States" has the same meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(5) PERSON.—The term "person", except as otherwise provided, means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

(6) PRECURSOR.—

(A) IN GENERAL.—The term "precursor" means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. The term includes any key component of a binary or multicomponent chemical system.

(B) LIST OF PRECURSORS.—Precursors which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

(7) PURPOSES NOT PROHIBITED BY THIS CHAPTER.—The term "purposes not prohibited by this chapter" means the following:

(A) PEACEFUL PURPOSES.—Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.

(B) PROTECTIVE PURPOSES.—Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.

(C) UNRELATED MILITARY PURPOSES.—Any military purpose of the United States that is not connected with the use of a chemical weapon or that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm.

(D) LAW ENFORCEMENT PURPOSES.—Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

(8) TOXIC CHEMICAL.—

(A) IN GENERAL.—The term "toxic chemical" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(B) LIST OF TOXIC CHEMICALS.—Toxic chemicals which have been identified for the application of verification measures under Article VI of the Convention are listed in

schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

(9) UNITED STATES.—The term "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States and includes all places under the jurisdiction or control of the United States, including—

(A) any of the places within the provisions of paragraph (41) of section 40102 of title 49, United States Code;

(B) any civil aircraft of the United States or public aircraft, as such terms are defined in paragraphs (17) and (37), respectively, of section 40102 of title 49, United States Code; and

(C) any vessel of the United States, as such term is defined in section 70502(b) of title 46, United States Code.

18 U.S.C. § 2331
Definitions

As used in this chapter—

(1) the term "international terrorism" means activities that—

(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum;

(2) the term "national of the United States" has the meaning given such term in section 101(a)(22) of the Immigration and Nationality Act;

(3) the term "person" means any individual or entity capable of holding a legal or beneficial interest in property;

(4) the term "act of war" means any act occurring in the course of—

(A) declared war;

(B) armed conflict, whether or not war has been declared, between two or more nations; or

(C) armed conflict between military forces of any origin; and

(5) the term "domestic terrorism" means activities that—

(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State;

(B) appear to be intended—

(i) to intimidate or coerce a civilian population;

(ii) to influence the policy of a government by intimidation or coercion; or

(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and

(C) occur primarily within the territorial jurisdiction of the United States.

18 U.S.C. § 2332c (1996)

(a) Prohibited acts.-

(1) Offense.-A person shall be punished under paragraph (2) if that person, without lawful authority, uses, or attempts or conspires to use, a chemical weapon against-

(A) a national of the United States while such national is outside of the United States;

(B) any person within the United States; or

(C) any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside of the United States.

(2) Penalties.-A person who violates paragraph (1)-

(A) shall be imprisoned for any term of years or for life; or

(B) if death results from that violation, shall be punished by death or imprisoned for any term of years or for life.

(b) Definitions.-As used in this section-

(1) the term "national of the United States" has the same meaning as in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)); and

(2) the term "chemical weapon" means any weapon that is designed or intended to cause widespread death or serious bodily injury through the release, dissemination, or impact of

toxic or poisonous chemicals or precursors of toxic or poisonous chemicals.

18 U.S.C. § 2339
Harboring or concealing terrorists

(a) Whoever harbors or conceals any person who he knows, or has reasonable grounds to believe, has committed, or is about to commit, an offense under section 32 (relating to destruction of aircraft or aircraft facilities), section 175 (relating to biological weapons), section 229 (relating to chemical weapons), section 831 (relating to nuclear materials), paragraph (2) or (3) of section 844(f) (relating to arson and bombing of government property risking or causing injury or death), section 1366(a) (relating to the destruction of an energy facility), section 2280 (relating to violence against maritime navigation), section 2332a (relating to weapons of mass destruction), or section 2332b (relating to acts of terrorism transcending national boundaries) of this title, section 236(a) (relating to sabotage of nuclear facilities or fuel) of the Atomic Energy Act of 1954 (42 U.S.C. 2284(a)), or section 46502 (relating to aircraft piracy) of title 49, shall be fined under this title or imprisoned not more than ten years, or both.

(b) A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

18 U.S.C. § 2339A
Providing material support to terrorists

(a) OFFENSE.—Whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section 32, 37, 81, 175, 229, 351, 831, 842(m) or (n), 844(f) or (i), 930(c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123(b) of title 49, or any offense listed in section 2332b(g)(5)(B) (except for sections 2339A and 2339B) or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act, shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. A violation of this section may be prosecuted in any Federal judicial district in which the underlying offense was committed, or in any other Federal judicial district as provided by law.

(b) DEFINITIONS.—As used in this section—

(1) the term "material support or resources" means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment,

facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term "training" means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term "expert advice or assistance" means advice or assistance derived from scientific, technical or other specialized knowledge.

Excerpts from the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction

PREAMBLE

The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction,

Desiring to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 (the Geneva Protocol of 1925),

Recognizing that this Convention reaffirms principles and objectives of and obligations assumed under the Geneva Protocol of 1925, and the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction signed at London, Moscow and Washington on 10 April 1972,

Bearing in mind the objective contained in Article IX of the Convention on the Prohibition of the

Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,

Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925,

Recognizing the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare,

Considering that achievements in the field of chemistry should be used exclusively for the benefit of mankind,

Desiring to promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under this Convention in order to enhance the economic and technological development of all States Parties,

Convinced that the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives,

Have agreed as follows:

ARTICLE I

General Obligations

1. Each State Party to this Convention undertakes never under any circumstances:

   (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;

   (b) To use chemical weapons;

   (c) To engage in any military preparations to use chemical weapons;

   (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party, in accordance with the provisions of this Convention.

4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

5. Each State Party undertakes not to use riot control agents as a method of warfare.

ARTICLE II

Definitions and Criteria

For the purposes of this Convention:

1. "Chemical Weapons" means the following, together or separately:

   (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;

   (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;

   (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

2. "Toxic Chemical" means:

Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(For the purpose of implementing this Convention, toxic chemicals which have been identified for the application of verification measures

are listed in Schedules contained in the Annex on Chemicals.)

3. "Precursor" means:

Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

(For the purpose of implementing this Convention, precursors which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

4. "Key Component of Binary or Multicomponent Chemical Systems" (hereinafter referred to as "key component") means:

The precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

5. "Old Chemical Weapons" means:

(a) Chemical weapons which were produced before 1925; or

(b) Chemical weapons produced in the period between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons.

6. "Abandoned Chemical Weapons" means:

Chemical weapons, including old chemical weapons, abandoned by a State after 1 January 1925 on the territory of another State without the consent of the latter.

7. "Riot Control Agent" means:

Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

8. "Chemical Weapons Production Facility":

(a) Means any equipment, as well as any building housing such equipment, that was designed constructed or used at any time since 1 January 1946:

(i) As part of the stage in the production of chemicals ("final technological stage") where the material flows would contain, when the equipment is in operation:

(1) Any chemical listed in Schedule 1 in the Annex on Chemicals; or

(2) Any other chemical that has no use, above 1 tonne per year on the territory of a State Party or in any other place under the jurisdiction or control of a State Party, for purposes not prohibited under this Convention, but can be used for chemical weapons purposes;

or

(ii) For filling chemical weapons, including, *inter alia*, the filling of chemicals listed in Schedule 1 into munitions, devices or bulk storage containers; the filling of chemicals into containers that form part of assembled binary munitions and devices or into chemical submunitions

that form part of assembled unitary munitions and devices, and the loading of the containers and chemical submunitions into the respective munitions and devices;

(b) Does not mean:

(i) Any facility having a production capacity for synthesis of chemicals specified in subparagraph (a) (i) that is less than 1 tonne;

(ii) Any facility in which a chemical specified in subparagraph (a) (i) is or was produced as an unavoidable by-product of activities for purposes not prohibited under this Convention, provided that the chemical does not exceed 3 per cent of the total product and that the facility is subject to declaration and inspection under the Annex on Implementation and Verification (hereinafter referred to as "Verification Annex"); or

(iii) The single small-scale facility for production of chemicals listed in Schedule 1 for purposes not prohibited under this Convention as referred to in Part VI of the Verification Annex.

9. "Purposes Not Prohibited Under this Convention" means:

(a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(b) Protective purposes, namely those purposes directly related to protection against toxic

chemicals and to protection against chemical weapons;

(c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;

(d) Law enforcement including domestic riot control purposes.

10. "Production Capacity" means:

The annual quantitative potential for manufacturing a specific chemical based on the technological process actually used or, if the process is not yet operational, planned to be used at the relevant facility. It shall be deemed to be equal to the nameplate capacity or, if the nameplate capacity is not available, to the design capacity. The nameplate capacity is the product output under conditions optimized for maximum quantity for the production facility, as demonstrated by one or more test-runs. The design capacity is the corresponding theoretically calculated product output.

11. "Organization" means the Organization for the Prohibition of Chemical Weapons established pursuant to Article VIII of this Convention.

12. For the purposes of Article VI:

(a) "Production" of a chemical means its formation through chemical reaction;

(b) "Processing" of a chemical means a physical process, such as formulation, extraction and purification, in which a chemical is not converted into another chemical;

(c) "Consumption" of a chemical means its conversion into another chemical via a chemical reaction.

* * *

ARTICLE IV

Chemical Weapons

1. The provisions of this Article and the detailed procedures for its implementation shall apply to all chemical weapons owned or possessed by a State Party, or that are located in any place under its jurisdiction or control, except old chemical weapons and abandoned chemical weapons to which Part IV (B) of the Verification Annex applies.

2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.

3. All locations at which chemical weapons specified in paragraph 1 are stored or destroyed shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments, in accordance with Part IV (A) of the Verification Annex.

4. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (a), has been submitted, provide access to chemical weapons specified in paragraph 1 for the purpose of systematic verification of the declaration through on-site inspection. Thereafter, each State Party shall not remove any of these chemical weapons, except to a chemical weapons destruction facility. It shall provide access to such chemical weapons, for the purpose of systematic on-site verification.

5. Each State Party shall provide access to any chemical weapons destruction facilities and their

storage areas, that it owns or possesses, or that are located in any place under its jurisdiction or control, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments.

6. Each State Party shall destroy all chemical weapons specified in paragraph 1 pursuant to the Verification Annex and in accordance with the agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than two years after this Convention enters into force for it and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such chemical weapons at a faster rate.

7. Each State Party shall:

   (a) Submit detailed plans for the destruction of chemical weapons specified in paragraph 1 not later than 60 days before each annual destruction period begins, in accordance with Part IV (A), paragraph 29, of the Verification Annex; the detailed plans shall encompass all stocks to be destroyed during the next annual destruction period;

   (b) Submit declarations annually regarding the implementation of its plans for destruction of chemical weapons specified in paragraph 1, not later than 60 days after the end of each annual destruction period; and

   (c) Certify, not later than 30 days after the destruction process has been completed, that

all chemical weapons specified in paragraph 1 have been destroyed.

8. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 6, it shall destroy chemical weapons specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.

9. Any chemical weapons discovered by a State Party after the initial declaration of chemical weapons shall be reported, secured and destroyed in accordance with Part IV (A) of the Verification Annex.

10. Each State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall transport, sample, store and destroy chemical weapons in accordance with its national standards for safety and emissions.

11. Any State Party which has on its territory chemical weapons that are owned or possessed by another State, or that are located in any place under the jurisdiction or control of another State, shall make the fullest efforts to ensure that these chemical weapons are removed from its territory not later than one year after this Convention enters into force for it. If they are not removed within one year, the State Party may request the Organization and other States Parties to provide

assistance in the destruction of these chemical weapons.

12. Each State Party undertakes to cooperate with other States Parties that request information or assistance on a bilateral basis or through the Technical Secretariat regarding methods and technologies for the safe and efficient destruction of chemical weapons.

13. In carrying out verification activities pursuant to this Article and Part IV (A) of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical weapons storage and their destruction among States Parties.

    To this end, the Executive Council shall decide to limit verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

    (a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part IV (A) of the Verification Annex;

    (b) Implementation of such an agreement provides for sufficient assurance of compliance with the relevant provisions of this Convention; and

    (c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.

14. If the Executive Council takes a decision pursuant to paragraph 13, the Organization

shall have the right to monitor the implementation of the bilateral or multilateral agreement.

15. Nothing in paragraphs 13 and 14 shall affect the obligation of a State Party to provide declarations pursuant to Article III, this Article and Part IV (A) of the Verification Annex.

16. Each State Party shall meet the costs of destruction of chemical weapons it is obliged to destroy. It shall also meet the costs of verification of storage and destruction of these chemical weapons unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 13, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

17. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

* * *

ARTICLE VII

National Implementation Measures

General undertakings

1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

   (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

   (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

   (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.

3. Each State Party, during the implementation of its obligations under this Convention, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and

shall cooperate as appropriate with other States Parties in this regard.

Relations between the State Party and the Organization

4. In order to fulfil its obligations under this Convention, each State Party shall designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization and other States Parties. Each State Party shall notify the Organization of its National Authority at the time that this Convention enters into force for it.

5. Each State Party shall inform the Organization of the legislative and administrative measures taken to implement this Convention.

6. Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with the implementation of this Convention. It shall treat such information and data exclusively in connection with its rights and obligations under this Convention and in accordance with the provisions set forth in the Confidentiality Annex.

7. Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical Secretariat.

* * *

RESPONDENT'S BRIEF

No. 12-158

In the Supreme Court of the United States

CAROL ANNE BOND, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

The Chemical Weapons Convention Implementation Act of 1998 (Act), Pub. L. No. 105-277, Div. I, 112 Stat. 2681-856, makes it unlawful for a person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1). It defines "chemical weapon" as a "toxic chemical" that can "cause death, temporary incapacitation or permanent harm," "except where intended" for, among other things, a "peaceful purpose." 18 U.S.C. 229F(1)(A), (7)(A) and (8)(A). The questions presented are:

1. Whether the use of a toxic chemical to harm another individual is use for a "peaceful purpose" and thus exempt from the Act's prohibition.

2. Whether Congress had the power under the Constitution to prohibit petitioner's conduct by means of the Act.

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American Bank & Trust Co. v. *Dallas Cnty.*, 463 U.S. 855 (1983) 15
Asakura v. *City of Seattle*, 265 U.S. 332 (1924) 43
Baker v. *Portland*, 2 F. Cas. 472 (C.C. Or. 1879) (No. 777) 37
Cherokee Nation v. *Southern Kan. Ry. Co.*, 135 U.S. 641 (1890) 25
Chirac v. *Lessee of Chirac*, 15 U.S. (2 Wheat.) 259 (1817) 34
Craig v. *Radford*, 16 U.S. (3 Wheat.) 594 (1818) 34
Elkison v. *Deliesseline*, 8 F. Cas. 493 (C.C.S.C. 1823) (No. 4,366) 35
Fairfax's Devisee v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1813) 34
Foster v. *Neilson*, 27 U.S. (2 Pet.) 253 (1829) 29
Geofroy v. *Riggs*, 133 U.S. 258 (1890) 45, 46, 52
Gibbons v. *Ogden*, 22 U.S. (9 Wheat.) 1 (1824) 54
Golan v. *Holder*, 132 S. Ct. 873 (2012) 52
Gonzales v. *Raich*, 545 U.S. 1 (2005) ..... *passim*

Cases—Continued: Page

Hall St. Assocs., LLC v. *Mattel, Inc.*, 552 U.S. 576 (2008) 14
Hauenstein v. *Lynham*, 100 U.S. 483 (1880) 54
Heath v. *Alabama*, 474 U.S. 82 (1985) 41
Heller v. *Doe*, 509 U.S. 312 (1993) 25
Hilton v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197 (1991) 46
Hines v. *Davidowitz*, 312 U.S. 52 (1941) 54
Holden v. *Joy*, 84 U.S. (17 Wall.) 211 (1872) 46
Hopkirk v. *Bell*, 7 U.S. (3 Cranch) 454 (1806) 35
Kiobel v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) 51
Kleppe v. *New Mexico*, 426 U.S. 529 (1976) 28
Mayor of New Orleans v. *United States*, 35 U.S. (10 Pet.) 662 (1836) 45
Medellin v. *Texas*, 552 U.S. 491 (2008) 29
Minnesota v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) 43
Missouri v. *Holland*, 252 U.S. 416 (1920) ..... *passim*
Neely v. *Henkel*, 180 U.S. 109 (1901) 44
New York v. *United States*, 505 U.S. 144 (1992) 42
Northern Sec. Co. v. *United States*, 193 U.S. 197 (1904) 24
Orr v. *Hodgson*, 17 U.S. (4 Wheat.) 453 (1819) 34
Parrott, In re, 1 F. 481 (C.C. Cal. 1880) 37
Pasquantino v. *United States*, 544 U.S. 349 (2005) 52
Perez v. *United States*, 402 U.S. 146 (1971) 23
Railway Labor Execs. Ass'n v. *Gibbons*, 455 U.S. 457 (1982) 53
Reid v. *Covert*, 354 U.S. 1 (1957) 28, 46, 52, 53

Cases—Continued: Page

Santovincenzo v. *Egan*, 284 U.S. 30 (1931) 43
Sosa v. *Alvarez-Machain*, 542 U.S. 692 (2004) 32
United States v. *Butler*, 297 U.S. 1 (1936) 53
United States v. *Comstock*, 130 S. Ct. 1949 (2010) 41, 42
United States v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936) 28, 41, 55
United States v. *IBM Corp.*, 517 U.S. 843 (1996) 47
United States v. *Kebodeaux*, 133 S. Ct. 2496 (2013) 40
United States v. *Lara*, 541 U.S. 193 (2004) 28, 29, 43
United States v. *Lopez*, 514 U.S. 549 (1995) 23, 53
United States v. *Morrison*, 529 U.S. 598 (2000) 24
United States v. *Pink*, 315 U.S. 203 (1942) 54
United States Postal Serv. v. *Council of Greenburgh Civic Ass'n*, 453 U.S. 114 (1981) 24
Ware v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) 35
Washington v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979) 43
Woods v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948) 25

Constitution, treaties, statutes and regulations:

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Additional Articles to the Treaty of the 18th of June, 1858, U.S.-China, July 4, 1868, 16 Stat. 740:
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Convention for the Protection of Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702 38
art. VIII 38
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993) 1, 3a
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Verification Annex:
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Convention Regarding Navigation, Fishing, and Trading, art. 5, U.S.-Russia, Apr. 17, 1824, 8 Stat. 304 41
International Convention with Respect to the Laws and Customs of War by Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 41
Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116 33
art. 9 33
Treaty on Commerce and Navigation, art. I, U.S.-Japan, Nov. 22, 1894, 29 Stat. 848 37
Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, Div. I, 112 Stat. 2681-856 (18 U.S.C. 229 *et seq.*) 3, 20, 76a
18 U.S.C. 229 ..... 8 27, 101a
18 U.S.C. 229(a) 10, 12, 101a
18 U.S.C. 229(a)(1) 1, 3, 6, 8, 12, 101a
18 U.S.C. 229C 15, 107a
18 U.S.C. 229F 12, 108a
18 U.S.C. 229F(1)(A) 8, 12, 108a
18 U.S.C. 229F(7)(A) 8, 13, 14, 21, 110a
18 U.S.C. 229F8(A) 8, 12, 110a
Clean Water Act, 33 U.S.C. 1251 *et seq.* 5

Statutes and regulations—Continued: Page

Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.* 5
Controlled Substances Act, 21 U.S.C. 801 *et seq.* 20
Migratory Bird Treaty Act, ch. 128, 40 Stat. 755....38
Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.* 5
Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.* 22
15 U.S.C. 2605(a) 22
18 U.S.C. 32 17
18 U.S.C. 81 17
18 U.S.C. 175 17
18 U.S.C. 175(a) 22
18 U.S.C. 831(a) 23
18 U.S.C. 842(n)(1)....23
18 U.S.C. 1366 17
18 U.S.C. 1708 ....1, 6
18 U.S.C. 2332a 17
18 U.S.C. 2332c (Supp. II 1996)....17
18 U.S.C. 2339 17
18 U.S.C. 2339(a) 17
18 U.S.C. 2339A 17
18 U.S.C. 2339A(a)....17
22 U.S.C. ch. 75 ....22, 78a
22 U.S.C. 6721 *et seq.* 20, 113a
42 U.S.C. 2284 17
49 U.S.C. 46502 17
1822 S.C. Acts 12 35

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15 C.F.R.:
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29 C.F.R. 1910.1026 5
40 C.F.R.:
Section 302.4 5
Section 401.15 5

Miscellaneous:

Christopher Andrew & Vasili Mitrokhin, *The Sword and the Shield: The Mitrokhin Archive and the Secret History of the KGB* (1999) 14
J. Aroesty et al., *Rand Publ'n Series No. R-3745-ACQ, Domestic Implementation of a Chemical Weapons Treaty* (1989) 22
Article-by-Article Analysis of the Convention, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993) 15
(Authentic) Treaty of Amity, Commerce, and Navigation, Between His Brittanick Majesty, and the United States of America. By Their President, With the Advice and Consent of Their Senate With an Addition of Two Important Motions (1795), *reprinted in* 18 *The Papers of Alexander Hamilton* (Harold C. Syrett ed. 1973) 33
Charles Henry Butler, *The Treaty Making Power of the United States* (1902):
Vol. 1 44
Vol. 2 44
143 Cong. Rec. 6,426-6,427 (1997) 2
Congressional Research Service, *Arms Control and Nonproliferation: A Catalog of Treaties and Agreements* (2013) 42

Miscellaneous—Continued: Page

Convention on the Elimination of All Forms of Discrimination Against Women, S. Exec. Rep. No. 9, 107th Cong., 2d Sess. (2002) 48

Edward S. Corwin, *National Supremacy: Treaty Power vs. State Power* (1913) 44

Council of Europe Convention on Cybercrime, S. Treaty Doc. No. 11, 108th Cong., 1st Sess. (2003) 48

Samuel B. Crandall, *Treaties: Their Making and Enforcement* (2d ed. 1916) 30, 31

David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) 33, 34, 35, 36, 37, 43

Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239 (2013) 32, 48

Louis Henkin, *Foreign Affairs and the Constitution* (1972) 48

Letter from Duke of Dorset to American Commissioners (Mar. 26, 1785), *in* 2 *The Diplomatic Correspondence of the United States of America* (1837) 31

Letter from George Washington to Hamilton (July 3, 1795), *reprinted in* 18 *Hamilton Papers* 33

Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* (1986) 30

1 NDRC, Office of Scientific Research & Dev., *Summary Technical Report of Division 9: Chemical Warfare Agents, and Related Chemical Problems* (1946) 4

Miscellaneous—Continued: Page

1 Op. Att'y Gen. 659 (1824) 35
2 Op. Att'y Gen. 426 (1831) 36
8 Op. Att'y Gen. 411 (1857) 36, 55
22 Op. Att'y Gen. 214 (1898) 36
33 Op. Att'y Gen. 560 (1923) 36
11 Op. O.L.C. 104 (1987) 36
Organisation for the Prohibition of Chem. Weapons, *OPCW: The Legal Texts* (2d ed. 2009) 12
Philomimus:
No. 6, Charleston Mercury, Sept. 11, 1823 36
No. 7, Charleston Mercury, Sept. 13, 1823 36
Remarks on the Treaty of Amity Commerce and Navigation lately made between the United States and Great Britain (July 9-11, 1795), *reprinted in* 18 *Hamilton Papers* 34
Restatement (Third) of the Foreign Relations of the United States (1987) 50
Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 Am. J. Int'l L. 273 (1907) 37, 38, 54
S. Exec. Rep. No. 33, 104th Cong., 2d Sess. (1996) 2, 15, 16, 17, 20, 22
S. Res. No. 75, 105th Cong., 1st Sess. (1997) 2
George Sutherland, *Constitutional Power and World Affairs* (1919) 28, 44, 46
William H. Taft, *The United States and Peace* (1914) 44, 54

Miscellaneous—Continued: Page

The Debates in the Several State Conventions on the Adoption of the Federal Constitution (Jonathan Elliot ed., 2d ed. 1888):
Vol. 2 ..... 31, 32
Vol. 3 ..... 31, 32
The Defence No. XXXVII (Jan. 6, 1796), *reprinted in* 20 *Hamilton Papers* 34
The Federalist (Gary Wills ed., 1982):
No. 22 (Alexander Hamilton) 31
No. 42 (James Madison) 32
No. 62 (James Madison) 32
No. 64 (John Jay) 32, 50
1 *The Records of the Federal Convention of 1787* (Max Farrand ed., rev. ed. 1966) 30, 31
Treaties and Executive Agreements: Hearings on S.J. Res. 1, Proposing an Amendment to the Constitution of the United States, Relating to the Legal Effect of Certain Treaties and Other International Agreements Before a Subcomm. of the S. Comm. on the Judiciary, 84th Cong., 1st Sess. (1955) 43
Henry St. George Tucker, *Limitations on the Treaty-Making Power Under the Constitution of the United States* (1915) 44
United Nations Convention Against Corruption, S. Exec. Rep. No. 18, 109th Cong., 2d Sess. (2006) 47
U.S. Envtl. Prot. Agency, *Chemical Manufacturing*, http://www.epa.gov/sectors/sectorinfo/sectorprofiles/chemical.html (last updated Jan. 12, 2011) 21

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BRIEF FOR THE UNITED STATES

CONSTITUTIONAL, TREATY, AND STATUTORY PROVISIONS INVOLVED

Pertinent provisions are set out in an appendix to this brief. App., *infra*, 1a-145a.

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and theft of mail, in violation of 18 U.S.C. 1708. She was sentenced to six years of imprisonment, to be followed by five years of supervised release. Pet. App. 51-52. The court of appeals affirmed her conviction, *id.* at 48-72, and this Court vacated and remanded, 131 S. Ct. 2355-2368. On remand, the court of appeals again affirmed. Pet. App. 1-47.

1. In 1997, the Senate gave its advice and consent to ratification of the Convention on the Prohibition of the

Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (the Convention or CWC), *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, at 278-451, 103d Cong., 1st Sess. (1993) (App., *infra*, 3a-75a); see S. Res. No. 75, 105th Cong., 1st Sess. (1997); 143 Cong. Rec. 6,426-6,427 (1997) (voting 74-26), and the Convention entered into force for the United States on April 29, 1997. The Convention was intended to fill the gaps left by an earlier chemical weapons convention, the 1925 Geneva Protocol, which prohibited use of chemical weapons only during warfare. S. Exec. Rep. No. 33, 104th Cong., 2d Sess. 2 (1996) (Senate Report).

In particular, the Convention sought "to exclude completely the possibility of the use of chemical weapons." App., *infra*, 4a (preamble). At the same time, the Convention recognized beneficial uses of even toxic chemicals, and included provisions "to promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under this Convention in order to enhance the economic and technological development of all States Parties." *Ibid.*

The Convention provides that States Parties "never under any circumstances" may "use chemical weapons" or "develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone." App., *infra*, 5a (art. I, para. 1). The Convention also obligates each State Party to enact domestic penal legislation that prohibits "natural and legal persons anywhere on its territory * * * from undertaking any activity prohibited to a State Party" under the Convention. *Id.* at 29a-

30a (art. VII, para. 1(a)). In addition, the Convention regulates international trade in chemicals by, among other things, prohibiting States Parties from exporting certain scheduled toxic chemicals to non-States Parties. Verification Annex, pt. VII, para. 31.

The Convention defines chemical weapons as, among other things, "[t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes." App., *infra*, 6a (art. II, para. 1(a)). "Toxic Chemical," in turn, means "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals" and "includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." *Id.* at 7a (art. II, para. 2). The "Purposes Not Prohibited Under this Convention" include "[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." *Id.* at 10a (art. II, para. 9).

To implement the United States' obligations under the Convention, Congress enacted the Chemical Weapons Convention Implementation Act of 1998 (Act), Pub. L. No. 105-277, Div. I, 112 Stat. 2681-856 (App., *infra*, 76a-145a). The criminal provisions of the Act mirror in all material respects the prohibitions in the Convention. The statute makes it unlawful for a person knowingly "to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. 229(a)(1); cf. App., *infra*, 5a (Convention art. 1, para. 1(a)).

2. Petitioner discovered that a friend, Myrlinda Haynes, had become pregnant as the result of an affair with petitioner's husband. Pet. App. 3, 91. In response, petitioner vowed to make Haynes's life "a living hell." *Id.* at 91.

Petitioner, a microbiologist, subsequently stole the arsenic-based specialty chemical 10-chlorophenoxarsine from her employer, the multinational chemical manufacturer Rohm & Haas. Pet. App. 49; C.A. App. 192. She also ordered a vial of potassium dichromate over the Internet. Pet. App. 49. Both of these "chemicals have the rare ability to cause toxic harm to individuals through minimal topical contact." *Ibid.*

One-half of a teaspoon of 10-chlorophenoxarsine (which is not available to the general public) may be lethal orally to an adult, while a few ingested crystals could kill a child. J.A. 48, 54; Pet. App. 49 n.1, 96. One to one-and-one-half teaspoons may be lethal to the touch. J.A. 48. In 1946, the National Defense Research Committee (NDRC) examined 10-chlorophenoxarsine as a candidate chemical warfare agent. 1 NDRC, Office of Scientific Research & Dev., *Summary Technical Report of Division 9: Chemical Warfare Agents, and Related Chemical Problems* Pt. I, at 107 (1946).

The other chemical, potassium dichromate, is lethal in even smaller quantities. J.A. 59, 60; Pet. App. 49 n.1. The chemical is "extremely destructive to tissues of the mucous membranes and upper respiratory tract." *Id.* at 95. It can cause ulceration and perforation of the nasal septum and pulmonary edema. *Ibid.* "Any skin contact may cause redness, pain, and severe burn, and if exposed to broken skin it may cause ulcers (chrome sores) and absorption, which may cause systemic poisoning, affecting kidney and liver functions." *Ibid.*

Both chemicals are subject to federal regulations because of their toxic qualities. 40 C.F.R. 401.15 (listing arsenic- and chromium-containing compounds as "toxic pollutants" under the Clean Water Act, 33 U.S.C. 1251 *et seq.*); 29 C.F.R. 1910.1026 (regulating workplace exposure to hexavalent chromium, a component of potassium dichromate, under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*); 40 C.F.R. 302.4 (listing potassium bichromate, another name for potassium dichromate, as a "hazardous substance," under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*).

Petitioner "attempted to poison Haynes with the[se] chemicals at least 24 times over the course of several months" in late 2006 and early 2007. Pet. App. 49-50; J.A. 71-72. Petitioner spread the substances on Haynes's mailbox, the door handles of her car, and the door knob to her home. Pet. App. 50. Petitioner left the chemicals in sufficient quantities to be "potentially * * * lethal." J.A. 56, 61-63.

Haynes had to hold her young daughter in one hand while using the other to check for and remove the chemicals she repeatedly noticed on her car door handles. J.A. 75-78. Before finding out what the substances were, Haynes would use the same free hand to give her child a toy, which the child would put in her mouth. J.A. 75. Despite the precautions taken by Haynes, she once suffered a chemical burn from contact with one of the substances. J.A. 79-80.

During the course of these attacks, Haynes called local police "[a]bout a dozen times." J.A. 73. They suggested that the substances might be cocaine and told Haynes to take her car to the car wash. J.A. 73-74, 78;

Pet. App. 50. When Haynes found powder on her mailbox, she again called the police, who told her to call the post office. J.A. 81. She did so, and postal inspectors placed surveillance cameras in and around Haynes's home. *Ibid.* Inspectors then identified petitioner as the perpetrator of the attacks and also observed petitioner stealing Haynes's mail. Pet. App. 92-93.

3. A grand jury in the Eastern District of Pennsylvania returned an indictment charging petitioner with two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. 229(a)(1), and two counts of theft of mail, in violation of 18 U.S.C. 1708. Pet. App. 51.

a. Petitioner moved to dismiss the chemical weapons counts on the ground that Congress had exceeded its Article I authority in enacting Section 229. Pet. App. 51. The district court denied the motion, holding that the statute covered petitioner's conduct and was validly "enacted by Congress and signed by the President under the necessary and proper clause" to "comply with the provisions of a treaty." *Id.* at 75.

Petitioner subsequently entered a conditional guilty plea, reserving her right to challenge the district court's denial of the motion to dismiss. Pet. App. 52.

b. Following oral argument on petitioner's appeal, the court of appeals requested supplemental briefing on petitioner's standing to assert a Tenth Amendment challenge to her conviction. Pet. App. 5 n.2. In response, the government argued that petitioner lacked standing to raise that claim, *ibid.*, and the court of appeals agreed, *id.* at 58-63.

c. This Court granted certiorari to address petitioner's standing. 131 S. Ct. at 2360. The government confessed error and filed a brief in support of petitioner's

argument that she had standing to challenge her conviction on federalism grounds. *Id.* at 2361.

This Court reversed and remanded, 131 S. Ct. at 2367, holding that, in an appropriate case, an individual litigant may challenge a law on the basis that it contravenes principles of federalism. *Id.* at 2365-2366. The Court "expresse[d] no view on the merits" of petitioner's constitutional claim. *Id.* at 2367.

4. On remand, the court of appeals affirmed petitioner's conviction. Pet. App. 1-47.

a. Rejecting petitioner's argument that the statute did not cover her conduct, the court of appeals explained that petitioner's use of "'highly toxic chemicals with the intent of harming Haynes,' can hardly be characterized as 'peaceful' under that word's commonly understood meaning" or the peaceful-purpose statutory exception. Pet. App. 10-11 (citation omitted).

b. The court of appeals also rejected petitioner's constitutional objection to her conviction. Pet. App. 12-36. The court emphasized that petitioner conceded that the Convention was a valid exercise of the Treaty Power. *Id.* at 20. The court found petitioner's concession wise, explaining: "[w]hatever the Treaty Power's proper bounds may be," the court was "confident that the Convention * * * falls comfortably within them." *Id.* at 26.

The court of appeals also concluded that Section 229 was "necessary and proper to carry the Convention into effect." Pet. App. 27. The court noted that this Court in *Missouri* v. *Holland*, 252 U.S. 416 (1920), in upholding the migratory-bird statute at issue in that case, had stated that "[i]f the treaty is valid there can be no dispute about the validity of the statute" implementing it "as a necessary and proper means to execute the powers of the Government." Pet. App. 27 (brackets in original)

(quoting 252 U.S. at 432). Here, the court observed, the treaty and the statute "are coextensive at least on the question of 'use,' which is the only point relevant to [petitioner's] as-applied challenge." *Id.* at 29 n.15; see *id.* at 34. The court also noted that the statute's application to petitioner did not "disrupt[] the balance of power between the federal government and the states." *Id.* at 36. It relied on this Court's holding in the context of Congress's Commerce Power that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Ibid.* (quoting *Gonzales* v. *Raich*, 545 U.S. 1, 23 (2005)).[1]

SUMMARY OF ARGUMENT

The prohibition on use of a chemical weapon in 18 U.S.C. 229 applied to petitioner's conduct, and that application is constitutional.

1. Petitioner's conduct violated the statute implementing the Convention. That law generally prohibits use of a chemical that can "cause death, temporary incapacitation, or permanent harm" to another, unless such use is for a "peaceful purpose." 18 U.S.C. 229(a)(1), 229F(1)(A), (7)(A) and (8)(A).

Contrary to petitioner's contention, her repeated use of highly toxic specialty chemicals to harm Myrlinda Haynes was not for a "peaceful purpose." That commonsense proposition is confirmed by the statutory definition of the term, which is limited to socially productive, non-malicious activities. The Act mirrors the

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[1] Because the court of appeals affirmed application of the Act to petitioner as an exercise of the Treaty Power, it found it unnecessary to address the government's alternative Commerce Power argument. Pet. App. 27 n.14.

Convention's comprehensive prohibition on use of chemical weapons by States Parties "under any circumstances" not specifically permitted by the Convention, App., *infra*, 5a (art. I, para. 1). Petitioner notes that the Act's prohibitions should extend only to conduct that, if undertaken by a State Party, would violate the Convention, but that observation does not assist her. A State Party's malicious use of a toxic chemical to injure or kill an individual *is* prohibited by the Convention.

2. Congress had authority under both the Commerce and Treaty Powers, coupled with the Necessary and Proper Clause, to proscribe petitioner's conduct.

a. The federal prohibition on malicious use of toxic chemicals is within Congress's authority to regulate activities that substantially affect interstate commerce as part of a comprehensive regime regulating commercial activity. The Convention promotes free trade in chemicals and was predicated on the view that "the complete and effective prohibition" on such chemicals' use as weapons was a "necessary step" toward achieving that end. App., *infra*, 5a (preamble). The regime established by the Convention is therefore analogous to the regulation of controlled substances upheld as a proper exercise of Congress's Commerce Power in *Gonzales* v. *Raich*, 545 U.S. 1 (2005).

b. The federal prohibition on petitioner's use of toxic chemicals to harm another was also a proper application of Congress's power to implement treaties.

Petitioner's attempt to carve out "local" conduct from the scope of the Treaty Power echoes arguments that have been made—and rejected—since the Founding. This Court's decision in *Missouri* v. *Holland*, 252 U.S. 416 (1920), clearly articulated why such an exception to the Treaty Power would be incompatible with its inten-

tionally broad scope, but it was just one of many examples throughout American history.

The Court should decline petitioner's invitation to overrule *Holland*. The longstanding rule foreclosing a "local" subject-matter exception to the Treaty Power is entirely workable. It has not disrupted the federal-state balance established by the Framers, which is protected by structural safeguards on the Treaty Power, such as the requirement that treaties be approved by two-thirds of the Senate. Congress has not exercised a general police power under the guise of implementing a treaty despite petitioner's hypothetical parade of horribles.

It is petitioner's proffered rule—under which judges would engage in case-by-case invalidation of exercises of the Treaty Power when they thought conduct was too "local" to be regulated—that would be unworkable. That approach would hamstring U.S. treaty negotiators and undermine global confidence in the United States as a reliable treaty partner, to the detriment of the foreign policy and national security of the United States. It is thus not surprising that petitioner cites not one decision of this Court endorsing such case-by-case review of exercises of the Treaty Power.

ARGUMENT

PETITIONER WAS VALIDLY CONVICTED OF USING CHEMICAL WEAPONS UNDER 18 U.S.C. 229

Congress comprehensively banned non-peaceful uses of chemical weapons in 18 U.S.C. 229(a), in fulfillment of indisputably valid treaty obligations. Petitioner's conduct violated that criminal prohibition (which she concedes is constitutional on its face), and her as-applied constitutional challenges fail: the prohibition is valid as applied to her conduct both under Congress's power to regulate interstate commerce and under the Treaty

Power, each as implemented by the Necessary and Proper Clause.

The text and background of the underlying treaty show why States Parties agreed to penalize individual malicious use of toxic chemicals, and the Constitution's text, history, and this Court's precedents make clear that Congress has the power to implement that rational obligation. A ruling that Congress lacked such power would transgress long-settled Commerce Clause principles and impede the Nation's ability to ensure compliance with its valid international legal obligations. The Framers did not envision that the United States would lack power to act as one nation in making and fulfilling treaties; to the contrary, they wrote a Constitution that vested power to act in the national government, even when such action might implicate otherwise local affairs. Indeed, this Court has not once invalidated treaty-implementing legislation on federalism grounds, and petitioner's proposal that the Court begin doing so now through application of an ad hoc "too local" test would disrupt both settled constitutional understandings and the foreign policy of the United States.

I. PETITIONER'S CONDUCT WAS PROSCRIBED BY THE ACT

Petitioner contends (Br. 51) that her conduct was not prohibited by Section 229 because it was not "warlike" or "terrorist." That interpretation of the statute is foreclosed by its plain text, and neither principles of constitutional avoidance nor presumptions against altering the federal-state balance (*id.* at 18, 42-44) can justify petitioner's nontextual and unnatural reading.

A. Section 229 Broadly Prohibits Knowing Use Of A Chemical Weapon

Closely tracking the language of the Convention, Section 229 criminalizes "knowingly" "possess[ing]" or "us[ing]" a "chemical weapon." 18 U.S.C. 229(a)(1).[2] In relevant part, the Act defines the term "chemical weapon" as "[a] toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose." 18 U.S.C. 229F(1)(A). The Act, in turn, defines a "toxic chemical" to include "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." 18 U.S.C. 229F(8)(A); cf. App., *infra*, 7a (Convention art. II, para. 2) (same).

To ensure it does not reach non-malicious conduct, the Act contains a set of exemptions. In particular, the Act, tracking the Convention, exempts the use of chemicals for a "peaceful purpose," which the Act specifically defines as "[a]ny peaceful purpose related to an indus-

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[2] Section 229's criminal prohibition and definitions also closely track model implementing legislation issued by the Organisation for the Prohibition of Chemical Weapons (OPCW), the international implementing body of the CWC. Compare 18 U.S.C. 229(a) and 229F, with OPCW, *OPCW: The Legal Texts* 387-388, 394-395 (2d ed. 2009) (*Legal Texts*). Petitioner states that possession is not prohibited under the Convention. Pet. Br. 45. While the Convention does not use the word "possess," it reflects the same concept by prohibiting States Parties from "acquir[ing], stockpil[ing] or retain[ing] chemical weapons." App., *infra*, 5a (art. I, para. 1(a)). And the OPCW's model implementing legislation includes a prohibition on "possessing" chemical weapons. *Legal Texts* 394. In any event, petitioner used the chemicals here, and she does not allege that the statute's prohibition on "use" varies from the Convention's prohibition on "use." Pet. App. 35.

trial, agricultural, research, medical, or pharmaceutical activity or other activity." 18 U.S.C. 229F(7)(A).

B. Petitioner's Use Of Toxic Chemicals To Harm Haynes Was Not For A "Peaceful Purpose"

Petitioner does not dispute that she "knowingly" "use[d]" 10-chlorophenoxarsine and potassium dichromate in an attempt to harm Haynes. Indeed, she used the chemicals in quantities sufficient to kill Haynes and her infant daughter. See pp. 4-5, *supra*. Petitioner also does not dispute that the two substances are "toxic chemicals" within the meaning of the Act.[3]

Petitioner nonetheless argues that the statute's exception for "peaceful purposes," 18 U.S.C. 229F(7)(A), should be interpreted to protect her use of toxic chemicals. According to petitioner (Br. 18, 47), in "implement[ing] the Convention's direction to criminalize actions that would violate the Convention if undertaken by nation-states," Congress intended solely to criminalize "warlike conduct." Petitioner claims that her motivation (revenge) should be deemed "non-warlike" and hence "peaceful." *Id.* at 51. This contention fails for several reasons.

1. Petitioner's interpretation of the statute is foreclosed by its plain text

As a matter of simple English, use of a highly toxic chemical to injure or kill another individual is not use of the chemical for a "peaceful purpose." To the contrary, that is use of a "chemical" as a "weapon." Petitioner correctly observes that the Convention requires States

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[3] Given that petitioner does not dispute that the specialized, highly toxic chemicals she used are "toxic chemicals" for purposes of the Act, this case presents no occasion to address whether Congress intended it to apply to common household substances. Cf. Pet. Br. 56.

Parties to prohibit conduct by an individual that, if taken by a state, would violate the Convention, but incorrectly argues that it follows that prohibitions implementing the Convention are limited to what she characterizes as "warlike" conduct.

States have used toxic chemicals to injure or kill individuals outside of war. *E.g.*, Christopher Andrew & Vasili Mitrokhin, *The Sword and the Shield: The Mitrokhin Archive and the Secret History of the KGB* 361-362 (1999) (discussing KGB's targeted assassination of two Ukrainian nationalist leaders in the late 1950s with cyanide gas). Such state use of chemical weapons would violate the Convention. And the state would not be absolved of its violation if its use of the weapon were motivated by revenge (such as retaliation against an expatriate critic), as opposed to some other purpose. Prohibiting the use by an individual of toxic chemicals to injure or kill is entirely consistent with the Convention's requirements.

Petitioner's interpretation is also foreclosed by the statute's definition of "peaceful purpose" as "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity." 18 U.S.C. 229F(7)(A). Petitioner's contention—under which use of toxic chemicals to harm another would apparently be encompassed by the "other activity" catch-all—is irreconcilable with the rule that "when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows." *Hall St. Assocs., LLC* v. *Mattel, Inc.*, 552 U.S. 576, 586 (2008). The common thread running through the specifically-enumerated activities in the definition of "peaceful purpose" (industrial, agricultural, research, medical, and

pharmaceutical) is that they are non-malicious and socially beneficial. Petitioner's conduct was neither.

Finally, petitioner's interpretation is irreconcilable with Congress's inclusion of a provision stating that Section 229's prohibitions shall not "be construed to prohibit any individual self-defense device, including those using a pepper spray or chemical mace." 18 U.S.C. 229C. If Section 229 prohibited only what petitioner views as "warlike" use of chemical weapons, Section 229C would have been unnecessary. *American Bank & Trust Co.* v. *Dallas Cnty.*, 463 U.S. 855, 863-864 (1983) (provision's broad scope "reinforce[d]" by presence of statutory exemptions that would be "superfluous" if provision was given narrower interpretation).

2. Petitioner's interpretation is incompatible with the history and context of the Convention

The history of the Convention and its implementing legislation confirm the text's plain import, namely that its prohibitions extend beyond what petitioner characterizes as "warlike" uses of chemical weapons. Indeed, the Convention was enacted to take "a major step beyond the Geneva Protocol of 1925, which only banned the use in war of chemical agents." Senate Report 171. The Convention's "prohibition on the use of chemical weapons extends beyond solely their use in international armed conflicts, i.e. chemical weapons may not be used *in any type of situation*, including purely domestic conflicts, civil wars or state-sponsored terrorism." *Article-by-Article Analysis of the Convention*, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. 1, 4 (1993) (emphasis added) (Convention Analysis). That is why the Convention drafters prohibited state use of chemical weapons "*under any circumstances*." App., *infra*, 5a (art. I, para. 1) (emphasis added); Convention Analysis 4.

States Parties agreed to enact legislation that would prohibit individuals from "undertaking any activity prohibited to a State Party under this Convention." App., *infra*, 30a (art. VII, para. 1(a)). Accordingly, because States Parties are prohibited from using chemical weapons "under any circumstances"—whether or not in war—so too are individuals regulated by the penal legislation implementing the Convention.

This broad scope of coverage implements the nonproliferation and free-trade goals of the Convention. Forbidding misuse and diversion by any person, regardless of a terrorism nexus or state sponsorship, reduces illicit trafficking in toxic chemicals and promotes confidence in licit chemical markets. It also helps to prevent state actors or terrorists from adopting the "screen" of a private actor to further chemical weapons goals. Finally, prohibiting all use of chemical weapons limits the ability of terrorists and hostile states to study chemical weapon use by independent individuals in order to evaluate the chemicals' weaponization potential.

3. Section 229 cannot be interpreted to include a terrorism element

Petitioner relatedly contends that Section 229 should be interpreted to include a terrorism element. Pet. Br. 54. This contention fails for all the reasons provided above; the Convention, and its implementing legislation, were intended to prohibit all malicious uses of chemical weapons, not just a subset. While the treaty history shows that Congress viewed the CWC as "a useful and readily available tool in the fight against terrorism," it emphasized that the Convention was not limited to counterterrorism. Senate Report 209 (the Convention "was *not* designed to prevent chemical terrorism") (emphasis

added). Instead, it was "an arms control and nonproliferation treaty." *Ibid.*

Petitioner derives her view of congressional purpose from Section 229's inclusion as a predicate offense in statutes that prohibit "[h]arboring or concealing terrorists," 18 U.S.C. 2339, and "[p]roviding material support to terrorists," 18 U.S.C. 2339A. But most of the other statutes listed as predicate offenses also lack a terrorist intent element. 18 U.S.C. 2339(a), 2339A(a) (citing, *e.g.*, 18 U.S.C. 32, 175, 1366, 2332a, 42 U.S.C. 2284, 49 U.S.C. 46502). In addition, the list of statutes referenced in 18 U.S.C. 2339A includes crimes like arson (18 U.S.C. 81) that have no necessary connection to terrorism.

Petitioner points out that when Congress enacted Section 229 it repealed a previous chemical weapons prohibition, 18 U.S.C. 2332c (Supp. II 1996), that was in the "Terrorism" chapter of Title 18, and suggests that this substitution supports her contention that Section 229 should be read to include a terrorism element. Pet. Br. 48-49. That assertion is doubly mistaken. First, Congress's decision to repeal Section 2332c and replace it with a different statute that is *not* codified in the terrorism chapter is consistent with Congress's intent to comprehensively address all aspects of chemical weapons use, not just those related to terrorism. Second, the repealed chemical weapons statute did not contain a terrorism motive element. 18 U.S.C. 2332c (Supp. II 1996).

II. THE ACT'S APPLICATION TO PETITIONER IS CONSTITUTIONAL

Section 229's prohibition on petitioner's use of chemical weapons is independently supported by both Congress's Commerce Power and its Treaty Power, as implemented by the Necessary and Proper Clause. While

petitioner has advanced no persuasive justification rooted in the Constitution's text, structure, or history, or in this Court's precedents, that would support the creation of a novel, ad hoc "local activities" carve-out from Congress's power to implement valid treaties, her argument also fails for the basic reason that her conduct was not too "local" to fall within Congress's enumerated powers, even apart from the Treaty Power. It is therefore useful first to examine how Congress's Commerce Power applies before refuting petitioner's treaty claim that the application of the Act here impermissibly extends federal law to inherently local activity.

A. The Prohibition On Petitioner's Use Of Toxic Chemicals Is Within Congress's Commerce Power

1. Section 229 is part of a comprehensive scheme of commodity regulation and thus within the Commerce Power

a. Congress has the power "[t]o regulate Commerce with foreign Nations, and among the several States," and to "make all Laws which shall be necessary and proper for carrying into Execution" that power. U.S. Const. Art. I, § 8, Cls. 3, 18. Congress may use its Commerce Power to, among other things, "regulate activities that substantially affect interstate commerce." *Gonzales* v. *Raich*, 545 U.S. 1, 16-17 (2005). When Congress uses its Commerce Power, it may "regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17.

b. Section 229—which is just one part of a larger, interconnected statutory scheme to promote legitimate trade in toxic chemicals both domestically and interna-

tionally through deterring impermissible use—is a proper exercise of Congress's Commerce Power.

One of the CWC's express objectives was "promot[ion of] free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under this Convention in order to enhance the economic and technological development of all States Parties." App., *infra*, 4a (preamble); see *id.* at 64a (art. XI). And the Convention states that "a necessary step towards the achievement" of that "common objective[]" (as well as the others specified in the Convention's preamble) is "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons." *Id.* at 5a (preamble). Accordingly, each State Party agreed to "adopt the necessary measures to ensure that toxic chemicals and their precursors are *only* developed, produced, otherwise acquired, retained, transferred, or used within its territory * * * for purposes not prohibited under this Convention." *Id.* at 27a (art. VI, para. 2) (emphasis added).

To further the dual purposes of the Convention—both to promote legitimate commerce in chemicals and to eliminate chemical weapons that are a threat to that commerce—the Convention set forth verification measures, App., *infra*, 27a (art. VI, para. 2), and required States Parties to implement its ban on impermissible uses and transfers of toxic chemicals, *id.* at 29a-30a (art. VII). The Convention also created financial incentives for countries to join by restricting international trade in certain chemicals with nonparties. Verification Annex, pt. VI.

Congress's statute implementing the Convention in turn established a comprehensive regulatory scheme governing legitimate commerce in toxic chemicals while at the same time safeguarding against their diversion into illegal channels. In particular, the Act created inspection requirements for certain facilities dealing in those chemicals, 22 U.S.C. 6721 *et seq.*, while also creating the criminal prohibitions at issue in this case, 18 U.S.C. 229 *et seq.* The Commerce Department has promulgated extensive regulations to implement the statute. 15 C.F.R. Pts. 710-721.

Chemical industry representatives "worked closely with U.S. CWC negotiators for many years to develop treaty provisions" and also helped draft the implementing legislation. Senate Report 214-215. The trade group for the industry supported the Convention because it "provide[d] a unique balance between verification and deterrence needs, and the legitimate commercial interests of American business." *Id.* at 230.

c. The constitutionality of Section 229 as a component of a larger regulation of commercial commodities follows directly from this Court's decision in *Gonzales* v. *Raich*, which itself analogized to statutes indistinguishable from the Act.

In *Raich*, the respondents maintained that the "categorical prohibition" in the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.*, "of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medical purposes" exceeded Congress's authority under the Commerce Clause. 545 U.S. at 15. This Court rejected that argument. The Court explained that "the activities regulated by the CSA are quintessentially economic," as the statute is one "that regulates the production, distri-

bution, and consumption of commodities for which there is an established, and lucrative, interstate market." *Id.* at 25-26.

The Court noted that many of the substances subject to the CSA "have a useful and legitimate medical purpose" and that "[t]he regulatory scheme is designed to foster the beneficial use of those medications, to prevent their misuse, and to prohibit entirely the possession or use of" other substances. *Raich*, 545 U.S. at 24 (citation omitted); see *id.* at 14 (noting that drugs on CSA Schedule II are not prohibited entirely because "they have a currently accepted medical use"). Although acknowledging that the *Raich* respondents' own conduct was "noncommercial" and "different * * * from drug trafficking," *id.* at 26 (citation omitted), this Court held that these facts did not require an exemption from "the larger regulatory scheme," *id.* at 26-27.

Raich's analysis of the CSA's regulation of drugs applies equally to the regulation of toxic chemicals by the Chemical Weapons Convention Implementation Act of 1998. There is a "lucrative, interstate market" (545 U.S. at 25-26) in chemicals, many of them toxic.[4] Such chemicals have "useful and legitimate" applications, *id.* at 24, and the statute is intended both to "foster [their] beneficial use" and "prevent their misuse," *ibid.* In fact, the Act's criminal provisions address commerce directly; they expressly permit use of toxic chemicals for "industrial, agricultural, research, medical, or pharmaceutical activity." 18 U.S.C. 229F(7)(A). And, far from standing alone, Section 229 is just one part of "a lengthy and

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[4] The chemical industry is a significant part of the U.S. economy, with shipments valued at about $555 billion per year. U.S. Envtl. Prot. Agency, *Chemical Manufacturing*, http://www.epa.gov/sectors/sectorinfo/sectorprofiles/chemical.html (last updated Jan. 12, 2011).

detailed statute creating a comprehensive framework for regulating the production, distribution, and possession" (*Raich*, 545 U.S. at 24) of toxic chemicals.

The Act's comprehensive framework—including its criminal prohibitions and forfeiture provisions, reporting and inspection requirements, export controls, and a detailed enforcement regime, see 22 U.S.C. ch. 75; 15 C.F.R. Pts. 710-721—is itself just one part of an even broader regulation of hazardous chemicals by various federal statutory schemes. Senate Report 217 (noting that the chemical industry is "one of the most widely and deeply regulated industrial sectors" in the United States). The toxic chemicals at issue in this case, for instance, are subject to numerous federal regimes. See p. 5, *supra*. And the Toxic Substances Control Act (TSCA), 15 U.S.C. 2601 *et seq.*, authorizes the Environmental Protection Agency to limit the use (including intrastate use) of chemicals when the agency determines that they "present[] or will present an unreasonable risk of injury to health or the environment." 15 U.S.C. 2605(a); see J. Aroesty et al., *Rand Publ'n Series No. R-3745-ACQ, Domestic Implementation of a Chemical Weapons Treaty* 23 (1989) (TSCA "was designed to regulate the 65,000 existing chemicals in commerce and the 1000 or so new chemicals that enter the market each year.").

Given the analytical parallels between the CSA and the statute at issue here, it is not surprising that the Court in *Raich* cited as examples of valid exercises of the Commerce Power a series of treaty-implementing criminal statutes that are materially indistinguishable from Section 229. 545 U.S. at 26 n.36. Those statutes include: 18 U.S.C. 175(a), which implements the Biological Weapons Convention by making it unlawful to

"knowingly develop[], produce[], stockpile[], transfer[], acquire[], retain[], or possess[] any biological agent, toxin, or delivery system for use as a weapon"; 18 U.S.C. 831(a), which implements the Convention on the Physical Protection of Nuclear Material by making it unlawful under certain circumstances to "receive[], possess[], use[], transfer[], alter[], dispose[] of, or disperse[] any nuclear material"; and 18 U.S.C. 842(n)(1), which implements the Convention on the Marking of Plastic Explosives by making it unlawful "to ship, transport, transfer, receive, or possess any plastic explosive that does not contain a detection agent."

d. Petitioner describes her conduct as merely "local" and thus beyond Congress's regulatory power. Pet. Br. 11, 19. Even assuming *arguendo* that petitioner's characterization of her conduct is correct, its "local" nature would not invariably immunize it from Congress's authority under the Commerce Power. Congress is entitled to regulate "purely intrastate activity that is not itself 'commercial,' * * * if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity." *Raich*, 545 U.S. at 18. This Court in *Raich* had "no difficulty" concluding that Congress "had a rational basis for believing that failure to regulate the intrastate manufacture and possession of marijuana would leave a gaping hole in the CSA." *Id.* at 22. The *de minimis* nature of a particular violation did not remove it from the ambit of Congress's authority. "Where the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (citation omitted). The Court distinguished its earlier decisions in *United*

States v. *Lopez*, 514 U.S. 549 (1995), and *United States* v. *Morrison*, 529 U.S. 598 (2000), both of which involved facial (not as-applied) challenges and neither of which involved regulation of commodities in a large interstate market. *Raich*, 545 U.S. at 23-26.

Here, as in *Raich*, Congress could reasonably have concluded that excising individual instances of diversion and abuse of toxic chemicals (based on the abuser's motivation or other malleable considerations) would undermine federal regulation of such commodities, *Raich*, 545 U.S. at 22, and *Lopez* and *Morrison* are distinguishable here for the same reasons that they were distinguishable in *Raich*. Indeed, exempting such individual activity could, for example, open the door to domestic and international black markets, private stockpiling of toxic chemicals for weapons purposes, and lone-wolf testing of the efficacy of toxic chemicals misused as weapons. And, more generally, such an exemption would undermine legitimate commerce in such chemicals, which requires assurances that the substances will not be misused and thus can be freely traded.

In any event, petitioner's conduct was not purely local but was instead subject to federal jurisdiction in several respects. She purchased potassium dichromate over the Internet, and she stole 10-chlorophenoxarsine from international conglomerate Rohm & Haas. Pet. App. 49; J.A. 37-38, 44. Moreover, she put the chemicals on her victim's mail box, thus naturally triggering an investigation by federal postal inspectors. *United States Postal Serv.* v. *Council of Greenburgh Civic Ass'n*, 453 U.S. 114, 128 (1981) (residential letter box is "an essential part of the Postal Service's nationwide system for the delivery and receipt of mail"); *Northern Sec. Co.* v. *United States*, 193 U.S. 197, 337 (1904) (plurality opin-

ion) ("The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce or the transportation of the mails.") (citation omitted).

2. The Commerce Power basis for Section 229 is properly before the Court

Petitioner has contended that the government's Commerce Power argument has been waived, Cert. Reply Br. 9, but that is incorrect.

In the district court, the government stated that "Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties," and it cited as evidence the statute's title ("Chemical Weapons Convention Implementation Act of 1998"). J.A. 31. That statement was accurate as a description of the power Congress invoked when enacting the Act. The government in the district court, however, mistakenly assumed that the statute could not be sustained under any power other than the one expressly invoked by Congress, and the district court made the same error, Pet. App. 75. But it has long been settled that, apart from any authority invoked by Congress, this Court "will determine for itself whether the means employed by Congress have any relation to the powers granted by the Constitution." *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641, 657 (1890); see *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) ("The question of the constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.").

A "statute is presumed constitutional and '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Heller* v. *Doe*, 509 U.S. 312, 320-321 (1993) (brack-

ets in original; citations omitted). It would not be consistent with that principle to invalidate an Act of Congress properly enacted pursuant to one of its enumerated powers because government lawyers did not initially invoke that power in defense of the statute.

A finding of waiver would be particularly inappropriate in this case. Petitioner contends that the assertedly "local" character of her crime places it outside of Congress's necessary and proper power to implement a treaty. Pet. Br. 20-27, 46, 57-62. But where the statute in question is supported by one of Congress's other enumerated powers, the activity is plainly not too "local" to fall within federal authority, even apart from Congress's power to implement treaties.

B. The Act's Application To Petitioner Is Independently Authorized By Congress's Power To Enact Laws Necessary And Proper To Carry Into Execution The Treaty Power

As the court of appeals held, Congress had the authority to prohibit petitioner's conduct under its power under the Necessary and Proper Clause to implement a treaty. That authority is broad in order to achieve its purpose: empowering the Nation to carry out its international legal commitments in furtherance of U.S. foreign policy and national security goals.

Petitioner concedes that the Convention itself is "valid," *e.g.*, Br. i, 16, and "admits 'that a treaty restricting chemical weapons is a "proper subject[] of negotiations between our government and other nations",'" Pet. App. 20; see *id.* at 38 (Rendell, J., concurring) (petitioner "unequivocally concedes that point"). Petitioner also concedes that Congress may implement a treaty such as the Convention through legislation and that the existence of a treaty "may alter the scope of what legislation

is necessary and proper." Pet. Br. 35; see *id.* at 57 (recognizing that "[t]he Convention may empower Congress to enact some legislation that would not be necessary or proper without it"). Moreover, while petitioner claims that the Act goes beyond the scope of the Convention in certain respects not material here, but see note 2, *supra*, she does not contend that it does so on the relevant prohibition on "use" of a chemical weapon, Pet. App. 34-35. And, in any event, petitioner has made clear that she "is *not* challenging 18 U.S.C. § 229 on its face." Pet. C.A. Supp. Br. 26; see Pet. App. 7 n.5.

"Instead, [petitioner] is raising a much more limited and narrowly focused as-applied challenge," contending that the facially valid Act, implementing a valid treaty, "cannot be constitutionally applied to her in the circumstances of this case." Pet. Supp. C.A. Br. 26; see Pet. Br. 57. According to this argument, any particular application of treaty-implementing legislation can be successfully challenged as unconstitutional if, in the particular case, a judge concludes that the application involves "local" activities. *Id.* at 22, 57-58. Moreover, petitioner contends that this is such a case, and that her conviction should therefore be set aside. Petitioner is mistaken. There is simply no basis in the Constitution, history, or this Court's precedents for carving out particular applications of a facially valid statute that implements a valid treaty on the ground that the conduct at issue is too local.

1. The Treaty Power is exclusively federal

The Treaty Clause grants the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. Art. II, § 2, Cl. 2. Unlike the various "legislative Powers" specifically enumerated

in Article I, Section 8, the Constitution assigns the Treaty Power to the President and Senate as a separate "Article II power." *United States* v. *Lara*, 541 U.S. 193, 201 (2004).

The Supremacy Clause, in turn, provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Thus, it is well-established that the Treaty Clause allows the federal government "to enter into and enforce a treaty * * * despite state objections" and that a valid treaty preempts inconsistent state law. *Kleppe* v. *New Mexico*, 426 U.S. 529, 545 (1976).

The Constitution expressly makes the federal grant of treaty-making authority exclusive by prohibiting States from "enter[ing] into any Treaty, Alliance, or Confederation." Art. I, § 10, Cl. 1; see *id.* Cl. 3 (prohibition on States' entering into "any Agreement or Compact" with a foreign power without first obtaining the consent of Congress). Moreover, "the treaty-making power was never possessed or exercised by the states separately; but was originally acquired and always exclusively held by the Nation, and, therefore, could not have been among those carved from the mass of state powers, and handed over to the Nation." George Sutherland, *Constitutional Power and World Affairs* 156 (1919) (Sutherland); see generally *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315-318 (1936) (*Curtiss-Wright*). Thus, the Tenth Amendment's reservation of rights to the States is "no barrier" to the adoption of treaties and to the enactment of treaty-implementing legislation. *Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

Although the Treaty Clause "does not literally authorize Congress to act legislatively," *Lara*, 541 U.S. at 201, the Necessary and Proper Clause empowers Congress to enact "Laws" that are "necessary and proper for carrying into Execution" all powers conferred in the Constitution, including the Treaty Power, Art. I, § 8, Cl. 18. Accordingly, while treaties are the supreme law of the land under the Supremacy Clause, when "treaty stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect." *Medellin* v. *Texas*, 552 U.S. 491, 505 (2008) (brackets and citation omitted); see *Foster* v. *Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829).

2. It has long been settled that the Treaty Power extends to matters ordinarily within the jurisdiction of the States

The court of appeals correctly held that Congress's prohibition of petitioner's conduct was an appropriate exercise of its Necessary and Proper authority to implement a treaty and did not implicate any other constitutional constraints. The Constitution's text, structure, and history, as well as longstanding treaty practice and an unbroken line of precedents, both before and after *Missouri* v. *Holland*, 252 U.S. 416 (1920), all support that conclusion.

a. Petitioner's argument that the federal government cannot effectuate its treaty obligations if doing so would result in regulation in areas of traditional state authority has been advanced—and rejected—numerous times since the Founding.

i. *Framing of the Constitution.* The national government's inability to ensure treaty compliance—and need to rely on the States when attempting to do so—

were among the principal defects in the Articles of Confederation that led to adoption of the Constitution.

Under the Articles of Confederation, Congress concluded numerous treaties, but because it lacked the necessary authority to enact laws to implement them, it typically passed resolutions urging the state legislatures to do so. Samuel B. Crandall, *Treaties: Their Making and Enforcement* 37-38 (2d ed. 1916) (Crandall). The States routinely ignored these resolutions. *Id.* at 39-42. As James Madison explained to his fellow delegates in Philadelphia, "[t]he tendency of the States to these violations has been manifested in sundry instances," and "[t]he files of Congs. contain complaints already, from almost every nation with which treaties have been formed." 1 *The Records of the Federal Convention of 1787*, at 316 (Max Farrand ed., rev. ed. 1966) (Farrand). When state legislatures failed to implement a provision of the 1783 peace treaty with Great Britain guaranteeing repayment of British debts, and state courts failed to recognize British creditors' ability to collect on those debts, Britain retaliated by refusing to relinquish forts on the northwest border it had agreed to abandon. Frederick W. Marks III, *Independence on Trial: Foreign Affairs and the Making of the Constitution* 3-10 (1986).

Other nations also expressed reluctance to enter into agreements with the United States because they lacked confidence in the American government's power to implement binding agreements, given the need for state implementation. As Madison told the Virginia ratifying convention, the "Confederation is so notoriously feeble, that foreign nations are unwilling to form any treaties with us; they are apprized that our general government cannot perform any of its engagements, but that they

may be violated at pleasure by any of the states." 3 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 135-136 (Jonathan Elliot ed., 2d ed. 1888) (*Elliot's Debates*). James Wilson made the same point to Pennsylvania delegates, noting that "[i]f we offer to treat with a nation, we receive this humiliating answer: 'You cannot, in propriety of language, make a treaty, because you have no power to execute it.'" 2 *Elliott's Debates* 526. One such humiliating answer came from a British diplomat in 1785, who advised his American counterpart: "The apparent determination of the respective States to regulate their own separate interests renders it absolutely necessary * * * that my court should be informed how far the [American] commissioners can be duly authorized to enter into any engagements with Great Britain, which it may not be in the power of any one of the States to render totally fruitless and ineffectual." Letter from Duke of Dorset to American Commissioners (Mar. 26, 1785), *in* 2 *The Diplomatic Correspondence of the United States of America* 297-298 (1837).

Given this experience, the Framers viewed the inability of Congress to prevent the breach of treaties as one of the chief defects of the Articles of Confederation. Crandall 49, 51; 1 Farrand 19 (remarks of Edmund Randolph) (listing, among reasons for proposing a new constitution, the government's inability under the Articles of Confederation to "cause infractions of treaties or of the law of nations, to be punished"); *The Federalist No. 22*, at 110 (Alexander Hamilton) (Garry Wills ed., 1982) (The "faith, the reputation, the peace of the whole union" are "continually at the mercy of the prejudices, the passions, and the interests of every member [State]

of which it is composed."); see *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 716 (2004).

The Constitution addressed the federal government's impotence under the Articles of Confederation to ensure treaty compliance by assigning the treaty-making power exclusively to the federal government and by ensuring that the power was "disembarrassed * * * of an exception [in the Articles of Confederation], under which treaties might be substantially frustrated by regulations of the States." *The Federalist No. 42*, at 211 (James Madison). At the same time, the Framers chose not to impose subject-matter limitations on the Treaty Power because "[t]he various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition." 3 *Elliot's Debates* 363 (Edmund Randolph); see *id.* at 504 (Edmund Randolph).

The Framers safeguarded the interests of the States by requiring that treaties be approved by two-thirds of the Senate, which they saw as the protector of State sovereignty given the States' equal representation and the fact that Senators were (at that time and until ratification of the 17th Amendment in 1913) chosen by state legislatures. 2 *Elliot's Debates* 507 (James Wilson) ("[E]ven in the making of treaties, the states are immediately represented."); *The Federalist No. 64*, at 329 (John Jay) (addressing the "fears and apprehensions of some, that the President and Senate may make treaties without an equal eye to the interests of all the States" by explaining that "all the States are equally represented in the senate, and by men the most able and the most willing to promote the interests of their constituents"); *The Federalist No. 62*, at 313 (James Madison) (power of state legislatures to appoint Senators will "secure the authority" of state governments); see Oona A. Hathaway

et al., *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239, 249 (2013) (Hathaway).

ii. *The Jay Treaty*. In 1795, the United States entered into a treaty with Great Britain to resolve mounting tensions that threatened to reignite warfare between the two nations. Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116. The treaty (known as the Jay Treaty) provided that British subjects could hold and alienate land in the United States. *Id.* art. 9. That controversial provision negated state common-law rules "subjecting alien-owned real property to forfeiture" and thus encroached on the police power of the States. David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1158 (2000) (Golove). Senator Tazewell of Virginia accordingly asked the Senate to decline its consent on the ground that this land-ownership provision "unconstitutionally invaded" "the rights of the individual States." *(Authentic) Treaty of Amity, Commerce, and Navigation, Between His Britannick Majesty, and the United States of America. By Their President, With the Advice and Consent of Their Senate With an Addition of Two Important Motions* (1795), *reprinted in* 18 *The Papers of Alexander Hamilton* 391 n.2 (Harold C. Syrett ed. 1973) (*Hamilton Papers*). The Senate rejected that contention, voting down Tazewell's motion 19-10, and went on to give its advice and consent to the Jay Treaty. Golove 1159.

Before ratifying the treaty, President Washington asked for Hamilton's views. Letter from George Washington to Hamilton (July 3, 1795), *reprinted in* 18 *Hamilton Papers* 398-400. In response, Hamilton explained that Tazewell's federalism-based objection "would total-

ly subvert the power of making treaties." *Remarks on the Treaty of Amity Commerce and Navigation lately made between the United States and Great Britain* (July 9-11, 1795), *reprinted in* 18 *Hamilton Papers* 428. Hamilton explained that a "Treaty cannot be made which alters the constitutions of the country or which infringes any express exceptions to the power in the constitution of the United States" but that "it is difficult to assign any other bounds to the power." *Ibid.* President Washington then ratified the treaty. Golove 1161.

Hamilton also publicly defended the Jay Treaty's constitutionality. In a series of essays, he explained that the Supremacy Clause's express reference to treaties was intended to dispel any "question whether a Treaty of the Union could embrace objects the internal regulation of which belonged to the separate authority of the States." *The Defence No. XXXVII* (Jan. 6, 1796), *reprinted in* 20 *Hamilton Papers* 15-16. In the face of these arguments, opponents of the Jay Treaty subsequently dropped their federalism-based constitutional objections. Golove 1175.

This Court later held that Article IX of the Jay Treaty was "the supreme law of the land" and rendered "ineffectual and void" contrary Virginia law. *Fairfax's Devisee* v. *Hunter's Lessee*, 11 U.S. (7 Cranch) 603, 627 (1813) (Story, J.); see *Orr* v. *Hodgson*, 17 U.S. (4 Wheat.) 453, 461-464 (1819) (same); *Craig* v. *Radford*, 16 U.S. (3 Wheat.) 594, 599-600 (1818) (same). In fact, the early Court repeatedly held that exercises of the Treaty Power validly regulated matters otherwise within the reserved police power of the States. *Chirac* v. *Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 270-271 (1817) (Marshall, C.J.) (treaty with France governing land ownership of French citizens preempted contrary Mary-

land law); *Hopkirk* v. *Bell*, 7 U.S. (3 Cranch) 454, 458 (1806) (treaty between United States and Great Britain ending Revolutionary War preempted state statute of limitations for recovery of a debt); *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) (Treaty of Peace with Great Britain took precedence over Virginia laws on debts).

iii. *Negro Seamen Act.* In 1822, South Carolina enacted the Negro Seamen Act, providing that when any ship calling at a South Carolina port "having on board any free negroes or persons of colour * * * such free negroes or persons of colour shall be liable to be seized and confined" in jail for the duration of the ship's stay. 1822 S.C. Acts 12. Great Britain objected that application of this law to its sailors violated an 1815 treaty, and when South Carolina jailed a British sailor pursuant to the law, Britain sought a writ of habeas corpus to free him. Golove 1212, 1214. South Carolina responded that the treaty with Great Britain could not displace the state statute because "the treaty making power can make no stipulation which shall impair the rights, which by the constitution are reserved 'to the States respectively, or to the people.'" *Id.* at 1215 (citation omitted).

Justice Johnson, riding circuit, determined that the South Carolina statute was unconstitutional, both because it conflicted with the treaty with Britain and because it purported to regulate interstate and foreign commerce. *Elkison* v. *Deliesseline*, 8 F. Cas. 493, 494-496 (C.C.S.C. 1823) (No. 4,366). Attorney General Wirt also issued an opinion finding the South Carolina law incompatible with the treaty. 1 Op. Att'y Gen. 659, 661 (1824) ("By the national constitution, the power of making treaties with foreign nations is given to the general government: and the same constitution declares that all

the treaties so made shall constitute a part of the law of the land.").[5]

Justice Johnson subsequently expounded on his view of the Treaty Power in a series of essays published under a pen name. Golove 1219. He argued that "the President and Senate can by virtue of the Treaty-making power do many things to which Congress in the exercise of its legislative power is not competent." *Philonimus No. 6*, Charleston Mercury, Sept. 11, 1823. He went on to cite 36 treaties that had "acted upon subjects within the acknowledged reservation of the States." *Philonimus No. 7*, Charleston Mercury, Sept. 13, 1823.

iv. *Anti-Chinese and Anti-Japanese Laws.* An 1868 treaty with China and an 1894 treaty with Japan provided that subjects of those countries residing in the United States would enjoy the same rights and privileges as citizens of other nations residing in this country. Additional Articles to the Treaty of the 18th of June, 1858,

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[5] Attorney General Berrien later issued an opinion stating that the South Carolina statute did not actually conflict with the treaty, 2 Opp. Att'y Gen. 426, 439-442 (1831), but that, if there were a conflict, the treaty had to give way because "Congress are under a constitutional obligation to respect" the "reserved powers of [the] State[s]" when engaged in the "formation of treaties," *id.* at 436-437. In an unpublished letter written the next year, new Attorney General Taney endorsed the view of Berrien but acknowledged that it was inconsistent with Supreme Court precedent. Golove 1227-1228 ("[J]udging from the past I think it highly probably that the [Supreme] Court will declare the law of S. Carolina null & void if contrary to the stipulations in the Treaty whenever the question comes before it.") (citation omitted). Opinions by subsequent attorneys general returned to the views expressed by Attorney General Wirt on the scope of the Treaty Power. 11 Op. O.L.C. 104, 108 (1987); 33 Op. Att'y Gen. 560, 562 (1923); 22 Op. Att'y Gen. 214, 215-218 (1898); 8 Op. Att'y Gen. 411, 414-418 (1857).

U.S.-China, arts. V, VI, July 4, 1868, 16 Stat. 740; Treaty on Commerce and Navigation, art. I, U.S.-Japan, Nov. 22, 1894, 29 Stat. 848.

In the late nineteenth and early twentieth centuries, some States and localities nonetheless passed laws requiring Japanese and Chinese children to attend separate schools or otherwise disadvantaging subjects of those countries. Golove 1246-1254. Even though these laws involved matters, such as education, within the reserved police powers of the States, courts invalidated them on the ground that they were supplanted by the treaties. *E.g.*, *In re Parrott*, 1 F. 481, 494 (C.C. Cal. 1880) (opinion of Hoffman, J.) ("[E]ven if the reserved power of the state over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid, because in conflict with the treaty."); *Baker* v. *Portland*, 2 F. Cas. 472, 474 (C.C. Or. 1879) (No. 777) ("[T]he treaty furnishes the law, and with that treaty no state or municipal corporation thereof can interfere. Admit the wedge of state interference ever so little, and there is nothing to prevent its being driven home and destroying the treaty and overriding the treaty-making power altogether.").

Secretary of State Elihu Root addressed the American Society of International Law during this period and explained that the United States had taken legal action to enjoin a discriminatory school ordinance passed by the city of San Francisco as in conflict with U.S. treaty obligations. *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 Am. J. Int'l L. 273, 276 (1907) (Root). Root emphasized that, under the Constitution, "[l]egislative power is distributed: upon some subjects the national legislature has authority; upon other subjects the state legislature

has authority," but that, in contrast, "[t]he treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states." *Id.* at 278. Accordingly, like Hamilton and Justice Johnson before him, Root explained that when the national government acts pursuant to the Treaty Power, "there can be no question of state rights, because the constitution itself, in the most explicit terms, has precluded the existence of any such question." *Id.* at 279.

b. This Court's decision in *Missouri* v. *Holland*, 252 U.S. 416 (1920) (Holmes, J.), rearticulated this well-established understanding of the Treaty Power and demonstrates why Section 229 falls squarely within the federal government's authority to ensure compliance with its treaty obligations.

i. In the Convention for the Protection of Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702 (Migratory Bird Convention), the United States and Great Britain mutually agreed to protect certain species of birds that, in their annual migrations, crossed between the United States and Canada. The treaty further provided that each country would "propose to their respective appropriate law-making bodies, the necessary measures for insuring the execution" of the treaty, art. VIII, which the United States accomplished through the Migratory Bird Treaty Act, ch. 128, 40 Stat. 755. That statute prohibited the killing, capturing, or selling of any of the migratory birds included within the terms of the treaty except as permitted by certain regulations.

Missouri argued that "the statute [was] an unconstitutional interference with the rights reserved to the States by the Tenth Amendment" and sought to enjoin its enforcement. *Holland*, 252 U.S. at 430-431. The

Court explained that "[t]o answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States," because the Constitution "delegated expressly" the treaty-making power to the national government and provided that such treaties were "the supreme law of the land." *Id.* at 432 (citing U.S. Const. Arts. II, § 2, and VI).

The Court accordingly rejected Missouri's argument that "a treaty cannot do" "what an act of Congress could not do unaided." *Holland*, 252 U.S. at 432. The Court explained that while "the great body of private relations usually fall within the control of the State," "a treaty may override its power" according to the express design of the Constitution. *Id.* at 434-435. The Migratory Bird Convention did not "contravene any prohibitory words to be found in the Constitution," and the implementing statute, which closely tracked the treaty, was "a necessary and proper means to execute the powers of the Government." *Id.* at 431-433.

The Court found compelling practical reasons for the Founders' conferral of a broad Treaty Power on the federal government because treaties often deal with matters of the "sharpest exigency for the national well being." *Holland*, 252 U.S. at 433. And observing that the Constitution expressly renders States "incompetent to act" on treaties, the Court further explained that it was "not lightly to be assumed that, in matters requiring national action, 'a power which must belong to and somewhere reside in every civilized government' is not to be found." *Ibid.* (citation omitted).

ii. *Holland* makes clear that Section 229 is a necessary and proper effectuation of U.S. treaty obligations. Petitioner contends (Br. 29) that the Court in *Holland* affirmed the Migratory Bird Convention only after

weighing for itself "the relative national and state interests" at stake. That is incorrect. The Court noted that "the great body of private relations usually fall within the control of the State" and held as a categorical matter that "a treaty may override its power." 252 U.S. at 434 (citing eight decisions of this Court in support); see *id.* at 432 (supporting same rule based on text and structure of Constitution). The Court later observed that "a national interest of very nearly the first magnitude" was involved in the Migratory Bird Convention and that Missouri's interest was insubstantial, *id.* at 435, but it nowhere suggested that its holding depended on a balancing of these interests. And petitioner points to no decision of this Court invalidating an exercise of the Treaty Power through application of any such balancing test.

In all events, *Holland*'s discussion of the Migratory Bird Convention itself is not directly relevant to petitioner's claim because petitioner here concedes that the CWC is valid. See p. 26, *supra*. Petitioner nonetheless appears to argue that *Holland*'s determination that the implementing legislation was constitutional is inapplicable here because in *Holland* there was a "tight nexus between the treaty and the legislation." Pet. Br. 29. But the same "tight nexus" is present here. See note 2, *supra*; Pet. App. 34. Upholding the application of the Act to petitioner's conduct does not imply a general "police power" to legislate solely to "protect the public" or safeguard "public safety." *Kebodeaux* v. *United States*, 133 S. Ct. 2496, 2507 (2013) (Roberts, C.J., concurring in the judgment) (citation omitted). Rather, the Act aims at distinctly international and national concerns embodied in a valid treaty: the attainment of a global scheme to protect against the malicious use of

chemical weapons while preserving beneficial, socially desirable uses and commerce—aims vital to national security.

Even assuming the Necessary and Proper Clause applies identically to treaty-implementation legislation as to other legislation, this Court's recent decisions on the scope of Congress's necessary-and-proper power in the domestic context leave no doubt that Section 229 was constitutionally applied to petitioner. *E.g.*, *United States* v. *Comstock*, 130 S. Ct. 1949 (2010). Analysis under that precedent also refutes petitioner's suggestion that upholding her conviction would imply a limitless congressional power to legislate on all local matters, thereby displacing state authority. Pet. Br. 20-26, 38-39 (describing hypothetical slippery slope concerns); see also pp. 32-33, *supra* (noting structural checks against such federal action in the treaty context).

First, the Constitution "grants Congress broad authority to enact federal legislation," *Comstock*, 130 S. Ct. at 1956, and that principle applies no less here than elsewhere. Indeed, federal authority is at its apex on matters related to foreign affairs. *Curtiss-Wright*, 299 U.S. at 315-318. Second, Section 229 adds incrementally to pre-existing and extensive federal regulation of harmful chemicals, see pp. 5, 22, *supra*; cf. *Comstock*, 130 S. Ct. at 1958-1961, and implements a treaty on weapons—a quintessentially international subject matter.[6] Third, Congress's judgment to adopt penal legisla-

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[6] Weapons have long been the subject of treaty-making. See, *e.g.*, p. 2, *supra* (discussing 1925 Geneva Protocol); International Convention with Respect to the Laws and Customs of War by Land, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 (outlawing "dum dum" bullets and asphyxiating gases); Convention Regarding Navigation, Fishing, and Trading art. 5, U.S.-Russia, Apr. 17, 1824, 8 Stat. 304

tion that mirrored the terms of the Convention and thus regulated comprehensively was plainly reasonable. Cf. *id.* at 1961-1962. Fourth, the statute does not displace the authority of the States. Cf. *id.* at 1962-1963. Pennsylvania remained free to prosecute petitioner, *Heath* v. *Alabama*, 474 U.S. 82, 88 (1985) (dual sovereign doctrine), and, in this case, petitioner's victim gave local authorities every opportunity to investigate and prosecute, but they declined. See pp. 5-6, *supra*. Fifth, "the links" between the Act and the Treaty Power "are not too attenuated." *Comstock*, 130 S. Ct. at 1963. Indeed, the prohibition at issue here "closely adheres to the language of the . . . Convention," which itself addresses a matter at the historical core of treaty-making. Pet. App. 34 (citation omitted). The statute's links to the treaty are tangible, direct, and strong. *Comstock*, 130 S. Ct. at 1967 (Kennedy, J., concurring). Accordingly, under *Comstock*'s analysis, Section 229 is valid necessary-and-proper legislation, and upholding it does not remotely suggest that "any one government [has] complete jurisdiction over all the concerns of public life." *Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011).[7]

iii. In the more than two centuries of American history, this Court has never invalidated Congress's implementation of a treaty on federalism grounds. In declining to do so, *Holland* articulated a settled understand-

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(prohibiting sales of "fire-arms, other arms, powder, and munitions of war of every kind" to "native[ ]" tribes); see generally Congressional Research Service, *Arms Control and Nonproliferation: A Catalog of Treaties and Agreements* (2013).

[7] Section 229 clearly does not transgress any structural state-sovereignty limitations identified in this Court's decisions on "proper" legislation, *e.g.*, *New York* v. *United States*, 505 U.S. 144, 161-166 (1992), and petitioner does not contend otherwise.

ing announced and applied by this Court in numerous cases before and after *Holland* itself. *Holland*, 252 U.S. at 434 (citing earlier cases); see *Lara*, 541 U.S. at 201 (citing *Holland*); *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (citing *Holland*); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 691-692 (1979) (citing *Holland*); *Santovincenzo* v. *Egan*, 284 U.S. 30, 40 (1931) (citing *Holland*); *Asakura* v. *City of Seattle*, 265 U.S. 332, 341 (1924) (citing *Holland*).[8]

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[8] In the 1950s, Congress considered a constitutional amendment to abandon the rule applied in *Holland* and other cases. (The proposed amendment was one of several offered during this time by Senator John Bricker to modify the Treaty Power. The proposals are collectively referred to as the "Bricker Amendment." Golove 1273-1278.) In particular, the amendment would have provided that a "treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty." *Treaties and Executive Agreements: Hearings on S.J. Res. 1, Proposing an Amendment to the Constitution of the United States, Relating to the Legal Effect of Certain Treaties and Other International Agreements Before a Subcomm. of the S. Comm. on the Judiciary*, 84th Cong., 1st Sess. 280 (1955) (Statement of Att'y Gen. Herbert Brownell, Jr.) (Bricker Hearings); see *id.* at 22 (Senator Bricker's statement that "[t]his part of the amendment would repeal *Missouri* v. *Holland*"). After President Eisenhower and Secretary of State Dulles "convinced much of the Senate that *Missouri* could not be overturned without seriously endangering the conduct of U.S. foreign policy and the interests of American citizens abroad," "support in the Senate evaporated," and Senator Bricker abandoned this component of his proposal. Golove 1276; see Bricker Hearings 283 (Statement of Att'y Gen. Herbert Brownell, Jr.) (warning that "many existing treaties and international agreements would be threatened with possible attack in the courts if the proposal is put on the books" and that the proposal represents a "real and grave threat to our national security and our existing constitutional system"); *id.* at 986-992 (State Department list of 84 treaties entered into by the United

Indeed, nearly 20 years before *Holland*, the Court issued a parallel holding in *Neely* v. *Henkel*, 180 U.S. 109 (1901). In that case, an individual subject to an extradition statute enacted pursuant to a treaty with Spain argued that the statute was "not a necessary or appropriate instrumentality for carrying into effect or executing any of the known powers of Congress," Transcript of Record at 2, *Neely*, *supra*; *Neely*, 180 U.S. at 121-122. In a unanimous opinion written by Justice Harlan, the Court rejected that contention on the ground that the Necessary and Proper Clause "includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power." *Id.* at 121. The Court thus found it unnecessary to decide whether the extradition statute might have been supported by another enumerated power. *Id.* at 122.

Given this history, it is not surprising that the leading constitutional commentators writing before *Holland* expressed views on the scope of the Treaty Power fully supportive of the decision's analysis. See, *e.g.*, Sutherland 153-165[9]; William H. Taft, *The United States and Peace* 76-79 (1914) (Taft); Edward S. Corwin, *National Supremacy: Treaty Power vs. State Power* (1913); 1 & 2 Charles Henry Butler, *The Treaty Making Power of the United States* (1902). But see Henry St. George Tucker,

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States since 1920 that could not have been made effective under the Bricker Amendment because they "relate[] in part to subject matter not within the delegated powers of the Congress").

[9] Indeed, future Justice Sutherland anticipated *Holland*'s holding and reasoning when discussing the nascent constitutional challenge to the statute implementing the Migratory Bird Convention. Sutherland 154-155.

Limitations on the Treaty-Making Power Under the Constitution of the United States 284-341, 380-419 (1915) (contending that the Treaty Power is limited by the police powers of the States and that, contrary to the argument of Secretary of State Root, pp. 37-38, *supra*, treaties with Japan and China could not supplant the reserved right of States to exclude from schools foreign children "whose social, moral, or racial habits may tend to break down, instead of build up American character").

Petitioner makes no effort to deal with this considerable body of authority, but instead contends that *Holland*'s holding is contrary to three earlier decisions. Pet. Br. 26-27, 30. That is incorrect.

Mayor of New Orleans v. *United States*, 35 U.S. (10 Pet.) 662 (1836), addressed whether the treaty ceding Louisiana to the United States also ceded to the federal government the right to dispose of certain public lands. The case turned entirely on the scope of the treaty in question, not on any constitutional limitation on Congress's authority to implement it. The Court held that the United States lacked the power to convey the lands because the original sovereigns—France and Spain—lacked that power, so they could not have conveyed it to the United States. *Id.* at 726, 731-732. In that particular context, the Court observed that "federal jurisdiction" cannot "be enlarged under the treaty-making power," *id.* at 736, but the Court also noted that if the Spanish king had enjoyed the right to dispose of the land, "there can be no doubt that it [would have] passed under the treaty to the United States." *Ibid.*

Far from supporting petitioner, *Geofroy* v. *Riggs*, 133 U.S. 258 (1890), reaffirms the broad scope of the Treaty Power. That decision held that a treaty with France governing inheritance of land—a subject quin-

essentially within the police power of the States—displaced a state common law rule. *Id.* at 272-273. The Court emphasized that "the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations." *Id.* at 266.

The Court noted that the Treaty Power would not "authorize what the Constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent." *Geofroy*, 133 U.S. at 267; accord *Covert*, 354 U.S. at 16-19 (plurality opinion). But it contrasted those accepted limitations involving the Constitution's express prohibitions (such as those in the Bill of Rights) and structural features of American government (such as the composition of the Senate or the structure of state governments) with repeatedly rejected subject-matter-based limitations on the Treaty Power. Regarding that second category, the Court explained, "it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country." *Geofroy*, 133 U.S. at 267 (citing cases); see Sutherland 161-162 (drawing same distinction).

The Court in *Holden* v. *Joy*, 84 U.S. (17 Wall.) 211 (1872), reflected the same distinction when it stated that the Treaty Power "is given, in general terms, without any description of the objects intended to be embraced within its scope" and "extend[s] to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relation between the States and the United States." *Id.* at 243.

3. *There is no basis for overruling* Holland

The Court should reject petitioner's invitation (Br. 33) to overrule *Holland*. This Court has "always required a departure from precedent to be supported by some 'special justification.'" *United States* v. *IBM Corp.*, 517 U.S. 843, 856 (1996) (citation omitted). No such special justification is present here. And "[s]tare decisis has added force" when the Political Branches have "acted in reliance on a previous decision." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 202 (1991). Since the founding, U.S. diplomats have negotiated with foreign powers armed with the assurance that the United States possesses the authority to ensure implementation of its treaty obligations, even in areas generally reserved to the States.

a. The rule articulated in *Holland* (and applied repeatedly by this Court both before and after) has not proven "unworkable in practice." *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 504 U.S. 768, 783 (1992) (citation omitted). To the contrary, the Nation's experience with treaty-making demonstrates that the Framers did not envision a judicially enforceable "too local" limit on congressional power to implement a treaty and were correct in their conclusion that requiring both Presidential approval and the concurrence of two-thirds of the Senate would provide robust protection for the interests of the States in the treaty-making process. See pp. 32-33, *supra*. And to enact implementing legislation, the House of Representatives must also agree to the new law, thus providing another layer of safeguards.

The Senate has frequently imposed conditions or reservations on treaties to reflect federalism concerns. *E.g.*, *United Nations Convention Against Corruption*, S. Exec. Rep. No. 18, 109th Cong., 2d Sess. 9 (2006)

(resolution of advice and consent) ("The United States of America reserves the right to assume obligations under the Convention in a manner consistent with its fundamental principles of federalism."); see Hathaway 315-316 (listing instances when "the Senate increasingly asserted its role as the guardian of [States'] interests against federal encroachment" in the treaty realm); Louis Henkin, *Foreign Affairs and the Constitution* 392 n.66 (1972).

The Executive Branch also takes into account federalism concerns—as well as the practical necessity of securing the support of two-thirds of the Senate—in developing the United States' position in treaty negotiations. For example, U.S. treaty negotiators can steer negotiations away from provisions that would needlessly federalize an issue best left to individual States or persuade other nations to address federalism in the treaty itself. *E.g.*, *Council of Europe Convention on Cybercrime*, S. Treaty Doc. No. 11, 108th Cong., 1st Sess. XXI-XXII, 21-22 (2003) (providing federalism carve-out in Article 41).[10]

b. It is petitioner's proffered alternative, not *Holland*, that is unworkable. Petitioner suggests that if the President and Senate want to achieve an important foreign policy or national security objective through a treaty that would require regulation of a matter otherwise within the States' jurisdiction, then the national

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[10] It is also not unusual for Senators to oppose treaties based in part on their concerns about a treaty's potential interference with state or local affairs. *E.g.*, *Convention on the Elimination of All Forms of Discrimination Against Women*, S. Exec. Rep. No. 9, 107th Cong., 2d Sess. 15 (2002) ("[I]mportant issues concerning division of Federal-State powers are presented by several of its provisions.") (Minority Views of Sens. Helms et al.).

government must look to "state law" to implement the U.S. obligation. Pet. Br. 60-61.

But it was the national government's crippling need to rely on the States to implement U.S. treaty obligations under the Articles of Confederation, and the resulting denigration of American authority and negotiating power on the world stage, that led to the framing of the Constitution's treaty provisions in the first place. See pp. 29-33, *supra*. Those provisions cannot now sensibly be read to require the very same chaotic practice of mandatory State treaty-implementation they were intended to end. While the Federal Government may *choose* to rely on state law to put the United States in compliance with a treaty obligation, that does not mean the Court should invalidate the political branches' considered judgment that the best way to ensure United States compliance with the obligation at issue here was to pass a comprehensive federal law. The Constitution gives the federal government exclusive power to enter into and negotiate treaties, and the Framers concluded that the federal government must have the concomitant power to ensure compliance.

Petitioner's suggestion that the treaty implementation power of the United States be subject to a case-by-case negation whenever a judge determines that the conduct regulated is too "local" or not of sufficiently "international" interest (Pet. Br. 22) would compound the unworkability of her proffered alternative to *Holland*.[11] American treaty negotiators must have confi-

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[11] For the reasons given above (see pp. 24-25, *supra*) petitioner's conduct was not "local," so she would not prevail even under her (unworkable) test. Nor is petitioner's claim advanced by her extended discussion of jurisdictional elements. Pet. Br. 38-42. She cites no

dence that the federal government possesses the authority to ensure compliance with U.S. treaty obligations and also have a clear understanding of the scope of their authority. Subjecting treaty-implementing legislation to ad-hoc, after-the-fact review and nullification on localism grounds would undermine both imperatives. Likewise, negotiators from other countries must have confidence that U.S. negotiators can deliver on their promises before agreeing to make their own commitments. *The Federalist No. 64*, at 329 (John Jay) ("[I]t would be impossible to find a nation who would make any bargain with us, which should be binding on them *absolutely*, but on us only so long and so far as we may think proper to be bound by it."). If U.S. treaty-implementation measures are judicially negated after-the-fact, the underlying international law treaty obligations would remain, and the United States could be subject to countermeasures, such as other states' retaliatory suspension of their treaty obligations to the United States. Restatement (Third) of the Foreign Relations of the United States § 905 & cmt. b, at 380, 381 (1987).

It is therefore unsurprising that petitioner cites not one decision in which this Court has ever engaged in (or even suggested the appropriateness of) this kind of case-by-case, as-applied examination of the Treaty Power to see whether the regulated conduct is too "local." As in the context of analysis under the Commerce Clause, courts do not "excise individual components" of a facially valid "larger scheme" enacted under the Treaty Power on the ground that they regulate "some purely intrastate activity." *Raich*, 545 U.S. at 22.

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precedent requiring any such element in treaty-implementing legislation.

The treaty at issue here demonstrates why this is so. Through the Convention, the United States manifested its judgment that use and proliferation of chemical weapons represented a grave threat to the national security of the United States. By entering into the Convention, it secured other nations' categorical commitment against such use and proliferation—"under any circumstances" not expressly permitted by the Convention. App., *infra*, 5a (art. I, para. 1). In return for that benefit and to support that non-proliferation goal, the United States made reciprocal commitments, including the commitment to enact penal legislation forbidding individuals from using chemical weapons "under any circumstances" not expressly permitted by the Convention. *Ibid.*; see *id.* at 30a (art. VII, para. 1(a)). That was a commitment that the President and two-thirds of the Senate believed necessary to make in order to secure the foreign-policy, national-security, and economic benefits that would flow from the Convention.

Congress therefore enacted legislation coextensive with the Nation's treaty obligations. The implementing legislation banned conduct like petitioner's while exempting use of toxic chemicals only for "peaceful purposes" and other purposes expressly exempted by the Convention itself. Congress did not add additional exemptions, such as one for "local" use of a chemical weapon. Indeed, the fashioning of legislative exceptions not found in the Convention itself could have encouraged other States Parties to adopt their own novel exceptions, thus undermining both the Convention and the national security interests of the United States. The Treaty Power should not be read to require that very same exemption in the guise of an "as-applied" adjudication. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659,

1664 (2013) (warning against "the danger of unwarranted judicial interference in the conduct of foreign policy"); *Pasquantino* v. *United States*, 544 U.S. 349, 369 (2005) (it would be "danger[ous]" to find a "prosecution barred based on * * * foreign policy concerns" that the Court "ha[s] neither aptitude, facilities nor responsibility to evaluate") (internal quotation marks omitted). Here, the President, two-thirds of the Senate (and then majorities of both Houses in passing the Act) determined that the Nation's paramount chemical weapons nonproliferation goals would be furthered by agreeing to the Convention and that the comprehensive penal legislation it called for was an integral part of that global nonproliferation framework. The courts should not second-guess that considered judgment.

c. *Holland* has not been undermined by subsequent decisions. Cf. Pet. Br. 33. *Holland* itself recognized that implementing legislation cannot override the "prohibitory words" of the Constitution applicable to all exercises of federal power, 252 U.S. at 433, and *Covert*, 354 U.S. at 16-17 (plurality opinion), reaffirmed that rule. Accord, *e.g.*, *Geofroy*, 133 U.S. at 267.[12] Indeed,

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[12] The Solicitor General's position in the oral argument in *Golan* v. *Holder*, 132 S. Ct. 873 (2012), is consistent with that position. Cf. Pet. Br. 37. That case involved the question whether a copyright statute violated the First Amendment or transgressed "an impenetrable barrier to the extension of copyright protection to authors whose writings, for whatever reason, are in the public domain." 132 S. Ct. at 884. The Solicitor General agreed that the Treaty Power would not permit Congress to breach prohibitory words applicable to all exercises of federal power, but explained that, contrary to petitioners' submission in that case, "no textual limit in the Copyright Clause * * * would preclude Congress from enacting this statute." Transcript of Oral Argument at 33, *Golan*, *supra*; see *ibid.* (statute did not violate First Amendment); Resps. Br. at 13-14, *Golan*, *supra*, (ex-

the *Covert* plurality emphasized that "there is nothing in [*Holland*] which is contrary to the position" taken in *Covert*. 354 U.S. at 18 (plurality opinion). The plurality explained that *Holland* "was concerned with the Tenth Amendment which reserves to the States or the people all power not delegated to the National Government." *Ibid.* "To the extent that the United States can validly make treaties," the plurality continued, "the people and the States have delegated their power to the National Government and the Tenth Amendment is no barrier." *Ibid.*

Nor is it at all anomalous that the federal government may accomplish an end through use of one specified power that it could not through another. Cf. Pet. Br. 24. For example, Congress's power "to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution," even though the spending power, like the other grants of legislative power, is in Article I. *United States* v. *Butler*, 297 U.S. 1, 66 (1936). Even less reason exists for assuming that the federal government's Article II Treaty Power is limited to those Article I direct grants of legislative authority, given the unique and compelling foreign affairs interests served by the Treaty Power.

Holland is also consistent with recent decisions on the Tenth Amendment and the scope of Congress's other enumerated powers. Cf. Pet. Br. 35 (citing, *e.g.*, *Lopez*, *supra*). Petitioner's contrary argument simply

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plaining that statute did not transcend any of the "constraints" imposed on congressional authority by Copyright Clause); see *Railway Labor Execs. Ass'n* v. *Gibbons*, 455 U.S. 457, 468-469 (1982) (uniformity requirement of Bankruptcy Clause would apply even if Congress acted pursuant to another enumerated power).

ignores the fundamental distinction between national actions taken pursuant to the Treaty Power and those taken pursuant to enumerated Article I powers.

When Congress lacks legislative authority under one of its enumerated powers, state authority remains over the subject, so there is no gap. Root 278. By contrast, the States are prohibited from engaging in treaty-making; the power is not distributed. *Ibid.*; accord Taft 76-77. That reflects the larger, "irrefutable postulate" that, in international affairs, the federal government has complete sovereignty and acts on behalf of all the citizens of the Nation. *Curtiss-Wright*, 299 U.S. at 317; see *United States* v. *Pink*, 315 U.S. 203, 233 (1942) ("Power over external affairs is not shared by the States," but "is vested in the national government exclusively."); *Hines* v. *Davidowitz*, 312 U.S. 52, 62-64 & n.11 (1941). "Every treaty made under the authority of the United States is made by the national government, as the direct and sole representative of every citizen of the United States residing in [Pennsylvania] equally with every citizen of the United States residing elsewhere." Root 279. And it follows from the national government's exclusive power to make treaties that it must have the power to ensure treaty compliance.

The flat constitutional prohibition on state treaty-making plainly distinguishes exercises of the Treaty Power from exercises of other enumerated powers, which inherently "presuppose[] something not enumerated." *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). Given that the Constitution "expressly forbid[s]" States from entering into treaties, the Court has recognized that "[i]f the national government has not the power to do what is done by such treaties, it cannot be done at all." *Hauenstein* v. *Lynham*, 100 U.S. 483, 490

(1880). As Attorney General Cushing explained in 1857, "[t]hat is not a supposition to be accepted, unless it be forced upon us by considerations of overpowering cogency." 8 Op. Att'y Gen. at 415. Without the power to implement treaty obligations, "the United States is not completely sovereign." *Curtiss-Wright*, 299 U.S. at 318; see *Holland*, 252 U.S. at 433.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

CONSTITUTIONAL, TREATY AND STATUTUTORY PROVISIONS INVOLVED

1. U.S. Const. Art. I, Section 8, Cl. 3 provides:

To regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes.

2. U.S. Const. Art. I, Section 8, Cl. 18 provides:

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

3. U.S. Const. Art. I, Section 10, Cl. 1 provides:

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

4. U.S. Const. Art. I, Section 10, Cl. 3 provides:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage

in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

5. U.S. Const. Art. II, Section 2, Cl. 2 provides:

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

6. U.S. Const. Art. VI, Cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

7. U.S. Const. Amend. X provides:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

8. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (CCWC) provides:*

PREAMBLE

The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of weapons of mass destruction,

Desiring to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925 (the Geneva Protocol of 1925),

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* The Annexes to the Convention are not reproduced here.

Recognizing that this Convention reaffirms principles and objectives of and obligations assumed under the Geneva Protocol of 1925, and the Convention on the Prohibition of the Development, Production and Stockpiling Bacteriological (Biological) and Toxin Weapons and on their Destruction signed at London, Moscow and Washington on 10 April 1972,

Bearing in mind the objective contained in Article IX of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction,

Determined for the sake of all mankind, to exclude completely the possibility of the use of chemical weapons, through the implementation of the provisions of this Convention, thereby complementing the obligations assumed under the Geneva Protocol of 1925,

Recognizing the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare,

Considering that achievements in the field of chemistry should be used exclusively for the benefit of mankind,

Desiring to promote free trade in chemicals as well as international cooperation and exchange of scientific and technical information in the field of chemical activities for purposes not prohibited under this Convention in order to enhance the economic and technological development of all States Parties,

Convinced that the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons, and their destruction, represent a necessary step towards the achievement of these common objectives,

Have agreed as follows:

ARTICLE I

GENERAL OBLIGATIONS

1. Each State Party to this Convention undertakes never under any circumstances:

   (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;

   (b) To use chemical weapons;

   (c) To engage in any military preparations to use chemical weapons;

   (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of an-

other State party, in accordance with the provisions of this Convention.

4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with the provisions of this Convention.

5. Each State party undertakes not to use riot control agents as a method of warfare.

ARTICLE II

DEFINITIONS AND CRITERIA

For the purposes of this Convention:

1. "Chemical Weapons" means the following, together or separately:

   (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;

   (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;

   (c) Any equipment specifically designed for use directly in connection with the employment of

munitions and devices specified in subparagraph (b).

2. "Toxic Chemical" means:

Any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

(For the purpose of implementing this Convention, toxic chemicals which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

3. "Precursor" means:

Any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. This includes any key component of a binary or multicomponent chemical system.

(For the purpose of implementing this Convention, precursors which have been identified for the application of verification measures are listed in Schedules contained in the Annex on Chemicals.)

4. "Key Component of Binary or Multicomponent Chemical Systems" (hereinafter referred to as "key component") means:

The precursor which plays the most important role in determining the toxic properties of the final

product and reacts rapidly with other chemicals in the binary or multicomponent system.

5. "Old Chemical Weapons" means:

   (a) Chemical weapons which were produced before 1925; or

   (b) Chemical weapons produced in the period between 1925 and 1946 that have deteriorated to such extent that they can no longer be used as chemical weapons.

6. "Abandoned Chemical Weapons" means:

   Chemical weapons, including old chemical weapons, abandoned by a State after 1 January 1925 on the territory of another State without the consent of the latter.

7. "Riot Control Agent" means:

   Any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure.

8. "Chemical Weapons Production Facility":

   (a) Means any equipment, as well as any building housing such equipment, that was designed, constructed or used at any time since 1 January 1946:

      (i) As part of the stage in the production of chemicals ("final technological stage")

where the material flows would contain, when the equipment is in operation:

(1) Any chemical listed in Schedule 1 in the Annex on Chemicals; or

(2) Any other chemical that has no use, above 1 tonne per year on the territory of a State Party or in any other place under jurisdiction or control of a State Party, for purposes not prohibited under this Convention, but can be used for chemical weapons purposes;

or

(ii) For filling chemical weapons, including, inter alia, the filling of chemicals listed in Schedule 1 into munitions, devices or bulk storage containers; the filling of chemicals into containers that form part of assembled binary munitions and devices or into chemical submunitions that form part of assembled unitary munitions and devices, and the loading of the containers and chemical submunitions into the respective munitions and devices;

(b) Does not mean:

(i) Any facility having a production capacity for synthesis of chemicals specified in subparagraph (a) (i) that is less than 1 tonne;

(ii) Any facility in which a chemical specified in subparagraph (a) (i) is or was produced as an unavoidable by-product of activities for purposes not prohibited under this Convention, provided that the chemical does not exceed 3 percent of the total product and that the facility is subject to declaration and inspection under the Annex on Implementation and Verification (hereinafter referred to as "Verification Annex"); or

(iii) The single small-scale facility for production of chemicals listed in Schedule 1 for purposes not prohibited under this Convention as referred to in Part VI of the Verification Annex.

9. "Purposes Not Prohibited Under this Convention" means:

(a) Industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(b) Protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

(c) Military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;

(d) Law enforcement including domestic riot control purposes.

10. "Production Capacity" means:

The annual quantitative potential for manufacturing a specific chemical based on the technological process actually used or, if the process is not yet operational, planned to be used at the relevant facility. It shall be deemed to be equal to the nameplate capacity or, if the nameplate capacity is not available, to the design capacity. The nameplate capacity is the product output under conditions optimized for maximum quantity for the production facility, as demonstrated by one or more test-runs. The design capacity is the corresponding theoretically calculated product output.

11. "Organization" means the Organization for the Prohibition of Chemical Weapons established pursuant to Article VIII of this Convention.

12. For the purposes of Article VI:

(a) "Production" of a chemical means its formation through chemical reaction;

(b) "Processing" of a chemical means a physical process, such as formulation, extraction and purification, in which a chemical is not converted into another chemical;

(c) "Consumption" of a chemical means its conversion into another chemical via a chemical reaction.

ARTICLE III

DECLARATIONS

1. Each State Party shall submit to the Organization, not later than 30 days after this Convention enters into force for it, the following declarations, in which it shall:

   (a) With respect to chemical weapons:

      (i) Declare whether it owns or possesses any chemical weapons, or whether there are any chemical weapons located in any place under its jurisdiction or control;

      (ii) Specify the precise location, aggregate quantity and detailed inventory of chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraphs 1 to 3, of the Verification Annex, except for those chemical weapons referred to in sub-subparagraph (iii);

      (iii) Report any chemical weapons on its territory that are owned and possessed by another State and located in any place under the jurisdiction or control of another State, in accordance with Part IV (A), paragraph 4, of the Verification Annex;

      (iv) Declare whether it has transferred or received, directly or indirectly, any chemi-

cal weapons since 1 January 1946 and specify the transfer or receipt of such weapons, in accordance with Part IV (A), paragraph 5, of the Verification Annex;

(v) Provide its general plan for destruction of chemical weapons that it owns or possesses, or that are located in any place under its jurisdiction or control, in accordance with Part IV (A), paragraph 6, of the Verification Annex;

(b) With respect to old chemical weapons and abandoned chemical weapons:

(i) Declare whether it has on its territory old chemical weapons and provide all available information in accordance with Part IV (B), paragraph 3, of the Verification Annex;

(ii) Declare whether there are abandoned chemical weapons on its territory and provide all available information in accordance with Part IV (B), paragraph 8, of the Verification Annex;

(iii) Declare whether it has abandoned chemical weapons on the territory of other States and provide all available information in accordance with Part IV (B), paragraph 10, of the Verification Annex;

(c) With respect to chemical weapons production facilities:

(i) Declare whether it has or has had any chemical weapons production facility under its ownership or possession, or that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946;

(ii) Specify any chemical weapons production facility it has or has had under its ownership or possession or that is or has been located in any place under its jurisdiction or control at any time since 1 January 1946, in accordance with Part V, paragraph 1, of the Verification Annex, except for those facilities referred to in sub-paragraph (iii);

(iii) Report any chemical weapons production facility on its territory that another State has or has had under its ownership and possession and that is or has been located in any place under the jurisdiction or control of another State at any time since 1 January 1946, in accordance with Part V, paragraph 2, of the Verification Annex;

(iv) Declare whether it has transferred or received, directly or indirectly, any equipment for the production of chemical weapons since 1 January 1946 and specify the transfer or receipt of such equipment, in accordance with Part V, paragraphs 3 to 5, of the Verification Annex;

(v) Provide its general plan for destruction of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, in accordance with Part V, paragraph 6, of the Verification Annex;

(vi) Specify actions to be taken for closure of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, in accordance with Part V, paragraph 1 (i), of the Verification Annex;

(vii) Provide its general plan for any temporary conversion of any chemical weapons production facility it owns or possesses, or that is located in any place under its jurisdiction or control, into a chemical weapons destruction facility, in accordance with Part V, paragraph 7, of the Verification Annex;

(d) With respect to other facilities:

Specify the precise location, nature and general scope of activities of any facility or establishment under its ownership or possession, or located in any place under its jurisdiction or control, and that has been designed, constructed or used since 1 January 1946 primarily for development of chemical weapons. Such declaration shall include, inter alia, laboratories and test and evaluation sites;

(e) With respect to riot control agents:

Specify the chemical name, structural formula and Chemical Abstracts Service (CAS) registry number, if assigned, of each chemical it holds for riot control purposes. This declaration shall be updated not later than 30 days after any change becomes effective.

2. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

ARTICLE IV

CHEMICAL WEAPONS

1. The provisions of this Article and the detailed procedures for its implementation shall apply to all chemical weapons owned or possessed by a State Party, or that are located in any place under its jurisdiction or control, except old chemical weapons and abandoned chemical weapons to which Part IV (B) of the Verification Annex applies.

2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.

3. All locations at which chemical weapons specified in paragraph 1 are stored or destroyed shall be subject to systematic verification through on-site inspection and monitoring with on-site instru-

ments, in accordance with Part IV (A) of the Verification Annex.

4. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (a), has been submitted, provide access to chemical weapons specified in paragraph 1 for the purpose of systematic verification of the declaration through on-site inspection. Thereafter, each State Party shall not remove any of these chemical weapons, except to a chemical weapons destruction facility. It shall provide access to such chemical weapons, for the purpose of systematic on-site verification.

5. Each State Party shall provide access to any chemical weapons destruction facilities and their storage areas, that it owns or possesses, or that are located in any place under its jurisdiction or control, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments.

6. Each State Party shall destroy all chemical weapons specified in paragraph 1 pursuant to the Verification Annex and in accordance with the agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than two years after this Convention enters into force for it and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such chemical weapons at a faster rate.

7. Each State Party shall:

   (a) Submit detailed plans for the destruction of chemical weapons specified in paragraph 1 not later than 60 days before each annual destruction period begins, in accordance with Part IV (A), paragraph 29, of the Verification Annex; the detailed plans shall encompass all stocks to be destroyed during the next annual destruction period;

   (b) Submit declarations annually regarding the implementation of its plans for destruction of chemical weapons specified in paragraph 1, not later than 60 days after the end of each annual destruction period; and

   (c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons specified in paragraph 1 have been destroyed.

8. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 6, it shall destroy chemical weapons specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.

9. Any chemical weapons discovered by a State Party after the initial declaration of chemical weapons shall be reported, secured and destroyed in accordance with Part IV (A) of the Verification Annex.

10. Each State Party, during transportation, sampling, storage and destruction of chemical weapons, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall transport, sample, store and destroy chemical weapons in accordance with its national standards for safety and emissions.

11. Any State Party which has on its territory chemical weapons that are owned or possessed by another State, or that are located in any place under the jurisdiction or control of another State, shall make the fullest efforts to ensure that these chemical weapons are removed from its territory not later than one year after this Convention enters into force for it. If they are not removed within one year, the State Party may request the Organization and other States Parties to provide assistance in the destruction of these chemical weapons.

12. Each State Party undertakes to cooperate with other States Parties that request information or assistance on a bilateral basis or through the Technical Secretariat regarding methods and technologies for the safe and efficient destruction of chemical weapons.

13. In carrying out verification activities pursuant to this Article and Part IV (A) of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical

weapons storage and their destruction among States Parties.

To this end, the Executive Council shall decide to limit verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

(a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part IV (A) of the Verification Annex;

(b) Implementation of such an agreement provides for sufficient assurance of compliance with the relevant provisions of this convention; and

(c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.

14. If the Executive Council takes a decision pursuant to paragraph 13, the Organization shall have the right to monitor the implementation of the bilateral or multilateral agreement.

15. Nothing in paragraphs 13 and 14 shall affect the obligation of a State Party to provide declarations pursuant to Article III, this Article and Part IV (A) of the Verification Annex.

16. Each State Party shall meet the costs of destruction of chemical weapons it is obliged to destroy. It shall also meet the costs of verification of storage and destruction of these chemical weapons

unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 13, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

17. The provisions of this Article and the relevant provisions of Part IV of the Verification Annex shall not, at the discretion of a State Party, apply to chemical weapons buried on its territory before 1 January 1977 and which remain buried, or which had been dumped at sea before 1 January 1985.

ARTICLE V

CHEMICAL WEAPONS PRODUCTION FACILITIES

1. The provisions of this Article and the detailed procedures for its implementation shall apply to any and all chemical weapons production facilities owned or possessed by a State Party, or that are located in any place under its jurisdiction or control.

2. Detailed procedures for the implementation of this Article are set forth in the Verification Annex.

3. All chemical weapons production facilities specified in paragraph 1 shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with Part V of the Verification Annex.

4. Each State Party shall cease immediately all activity at chemical weapons production facilities specified in paragraph 1, except activity required for closure.

5. No State Party shall construct any new chemical weapons production facilities or modify any existing facilities for the purpose of chemical weapons production or for any other activity prohibited under this Convention.

6. Each State Party shall, immediately after the declaration under Article III, paragraph 1 (c), has been submitted, provide access to chemical weapons production facilities specified in paragraph 1, for the purpose of systematic verification of the declaration through on-site inspection.

7. Each State Party shall:

   (a) Close, not later than 90 days after this Convention enters into force for it, all chemical weapons production facilities specified in paragraph 1, in accordance with Part V of the Verification Annex, and give notice thereof; and

   (b) Provide access to chemical weapons production facilities specified in paragraph 1, subsequent to closure, for the purpose of systematic verification through on-site inspection and monitoring with on-site instruments in order to ensure that the facility remains closed and is subsequently destroyed.

8. Each State Party shall destroy all chemical weapons production facilities specified in paragraph 1 and related facilities and equipment, pursuant to the Verification Annex and in accordance with an agreed rate and sequence of destruction (hereinafter referred to as "order of destruction"). Such destruction shall begin not later than one year after this Convention enters into force for it, and shall finish not later than 10 years after entry into force of this Convention. A State Party is not precluded from destroying such facilities at a faster rate.

9. Each State Party shall:

   (a) Submit detailed plans for destruction of chemical weapons production facilities specified in paragraph 1, not later than 180 days before the destruction of each facility begins;

   (b) Submit declarations annually regarding the implementation of its plans for the destruction of all chemical weapons production facilities specified in paragraph 1, not later than 90 days after the end of each annual destruction period; and

   (c) Certify, not later than 30 days after the destruction process has been completed, that all chemical weapons production facilities specified in paragraph 1 have been destroyed.

10. If a State ratifies or accedes to this Convention after the 10-year period for destruction set forth in paragraph 8, it shall destroy chemical weapons

production facilities specified in paragraph 1 as soon as possible. The order of destruction and procedures for stringent verification for such a State Party shall be determined by the Executive Council.

11. Each State Party, during the destruction of chemical weapons production facilities, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall destroy chemical weapons production facilities in accordance with its national standards for safety and emissions.

12. Chemical weapons production facilities specified in paragraph 1 may be temporarily converted for destruction of chemical weapons in accordance with Part V, paragraphs 18 to 25, of the Verification Annex. Such a converted facility must be destroyed as soon as it is no longer in use for destruction of chemical weapons but, in any case, not later than 10 years after entry into force of this Convention.

13. A State Party may request, in exceptional cases of compelling need, permission to use a chemical weapons production facility specified in paragraph 1 for purposes not prohibited under this Convention. Upon the recommendation of the Executive Council, the Conference of the States Parties shall decide whether or not to approve the request and shall establish the conditions upon which approval

is contingent in accordance with Part V, Section D, of the Verification Annex.

14. The chemical weapons production facility shall be converted in such a manner that the converted facility is not more capable of being reconverted into a chemical weapons production facility than any other facility used for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes not involving chemicals listed in Schedule 1.

15. All converted facilities shall be subject to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with Part V, Section D, of the Verification Annex.

16. In carrying out verification activities pursuant to this Article and Part V of the Verification Annex, the Organization shall consider measures to avoid unnecessary duplication of bilateral or multilateral agreements on verification of chemical weapons production facilities and their destruction among States Parties.

    To this end, the Executive Council shall decide to limit the verification to measures complementary to those undertaken pursuant to such a bilateral or multilateral agreement, if it considers that:

    (a) Verification provisions of such an agreement are consistent with the verification provisions of this Article and Part V of the Verification Annex;

(b) Implementation of the agreement provides for sufficient assurance of compliance with the relevant provisions of this Convention; and

(c) Parties to the bilateral or multilateral agreement keep the Organization fully informed about their verification activities.

17. If the Executive Council takes a decision pursuant to paragraph 16, the Organization shall have the right to monitor the implementation of the bilateral or multilateral agreement.

18. Nothing in paragraphs 16 and 17 shall affect the obligation of a State Party to make declarations pursuant to Article III, this Article and Part V of the Verification Annex.

19. Each State Party shall meet the costs of destruction of chemical weapons production facilities it is obliged to destroy. It shall also meet the costs of verification under this Article unless the Executive Council decides otherwise. If the Executive Council decides to limit verification measures of the Organization pursuant to paragraph 16, the costs of complementary verification and monitoring by the Organization shall be paid in accordance with the United Nations scale of assessment, as specified in Article VIII, paragraph 7.

ARTICLE VI

ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION

1. Each State Party has the right, subject to the provisions of this Convention, to develop, produce, otherwise acquire, retain, transfer and use toxic chemicals and their precursors for purposes not prohibited under this Convention.

2. Each State Party shall adopt the necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under this Convention. To this end, and in order to verify that activities are in accordance with obligations under the Convention, each State Party shall subject toxic chemicals and their precursors listed in Schedules 1, 2 and 3 of the Annex on Chemicals, facilities related to such chemicals, and other facilities as specified in the Verification Annex, that are located on its territory or in any other place under its jurisdiction or control, to verification measures as provided in the Verification Annex.

3. Each State Party shall subject chemicals listed in Schedule 1 (hereinafter referred to as "Schedule 1 chemicals") to the prohibitions on production, acquisition, retention, transfer and use as specified in Part VI of the Verification Annex. It shall

subject Schedule 1 chemicals and facilities specified in Part VI of the Verification Annex to systematic verification through on-site inspection and monitoring with on-site instruments in accordance with that Part of the Verification Annex.

4. Each State Party shall subject chemicals listed in Schedule 2 (hereinafter referred to as "Schedule 2 chemicals") and facilities specified in Part VII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.

5. Each State Party shall subject chemicals listed in Schedule 3 (hereinafter referred to as "Schedule 3 chemicals") and facilities specified in Part VIII of the Verification Annex to data monitoring and on-site verification in accordance with that Part of the Verification Annex.

6. Each State party shall subject facilities specified in Part IX of the Verification Annex to data monitoring and eventual on-site verification in accordance with that Part of the Verification Annex unless decided otherwise by the Conference of the States Parties pursuant to Part IX, paragraph 22, of the Verification Annex.

7. Not later than 30 days after this Convention enters into force for it, each State Party shall make an initial declaration on relevant chemicals and facilities in accordance with the Verification Annex.

8. Each State Party shall make annual declarations regarding the relevant chemicals and facilities in accordance with the Verification Annex.

9. For the purpose of on-site verification, each State Party shall grant to the inspectors access to facilities as required in the Verification Annex.

10. In conducting verification activities, the Technical Secretariat shall avoid undue intrusion into the State Party's chemical activities for purposes not prohibited under this Convention and, in particular, abide by the provisions set forth in the Annex on the Protection of Confidential Information (hereinafter referred to as "Confidentiality Annex").

11. The provisions of this Article shall be implemented in a manner which avoids hampering the economic or technological development of States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention.

ARTICLE VII

NATIONAL IMPLEMENTATION MEASURES

General undertakings

1. Each State Party shall, in accordance with its constitutional processes, adopt the necessary

measures to implement its obligations under this Convention. In particular, it shall:

(a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;

(b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and

(c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

2. Each State Party shall cooperate with other States Parties and afford the appropriate form of legal assistance to facilitate the implementation of the obligations under paragraph 1.

3. Each State Party, during the implementation of its obligations under this Convention, shall assign the highest priority to ensuring the safety of people and to protecting the environment, and shall cooperate as appropriate with other States Parties in this regard.

Relations between the State Party and the Organization

4. In order to fulfil its obligations under this Convention, each State Party shall designate or establish a National Authority to serve as the national focal point for effective liaison with the Organization and other States Parties. Each State Party shall notify the Organization of its National Authority at the time that this Convention enters into force for it.

5. Each State Party shall inform the Organization of the legislative and administrative measures taken to implement this Convention.

6. Each State Party shall treat as confidential and afford special handling to information and data that it receives in confidence from the Organization in connection with implementation of this Convention. It shall treat such information and data exclusively in connection with its rights and obligations under this Convention and in accordance with the provisions set forth in the Confidentiality Annex.

7. Each State Party undertakes to cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical Secretariat.

ARTICLE VIII

THE ORGANIZATION

A. GENERAL PROVISIONS

1. The States Parties to this Convention hereby establish the Organization for the Prohibition of Chemical Weapons to achieve the object and purpose of this Convention, to ensure the implementation of its provisions, including those for international verification of compliance with it, and to provide a forum for consultation and cooperation among States Parties.

2. All States Parties to this Convention shall be members of the Organization. A State Party shall not be deprived of its membership in the Organization.

3. The seat of the Headquarters of the Organization shall be The Hague, Kingdom of the Netherlands.

4. There are hereby established as the organs of the Organization: the Conference of the States Parties, the Executive Council, and the Technical Secretariat.

5. The Organization shall conduct its verification activities provided for under this Convention in the least intrusive manner possible consistent with the timely and efficient accomplishment of their objectives. It shall request only the information and data necessary to fulfil its responsibilities under this Convention. It shall take every precaution to protect the confidentiality of information on

civil and military activities and facilities coming to its knowledge in the implementation of this Convention and, in particular, shall abide by the provisions set forth in the Confidentiality Annex.

6. In undertaking its verification activities the Organization shall consider measures to make use of advances in science and technology.

7. The costs of the Organization's activities shall be paid by States Parties in accordance with the United Nations scale of assessment adjusted to take into account differences in membership between the United Nations and this Organization, and subject to the provisions of Articles IV and V. Financial contributions of States Parties to the Preparatory Commission shall be deducted in an appropriate way from their contributions to the regular budget. The budget of the Organization shall comprise two separate chapters, one relating to administrative and other costs, and one relating to verification costs.

8. A member of the Organization which is in arrears in the payment of its financial contribution to the Organization shall have no vote in the Organization if the amount of its arrears equals or exceeds the amount of the contribution due from it for the preceding two full years. The Conference of the States Parties may, nevertheless, permit such a member to vote if it is satisfied that the failure to pay is due to conditions beyond the control of the member.

B. THE CONFERENCE OF THE STATES PARTIES

Composition, procedures and decision-making

9. The Conference of the States Parties (hereinafter referred to as "the Conference") shall be composed of all members of this Organization. Each member shall have one representative in the Conference, who may be accompanied by alternates and advisers.

10. The first session of the Conference shall be convened by the depositary not later than 30 days after the entry into force of this Convention.

11. The Conference shall meet in regular sessions which shall be held annually unless it decides otherwise.

12. Special sessions of the Conference shall be convened:

    (a) When decided by the Conference;

    (b) When requested by the Executive Council;

    (c) When requested by any member and supported by one third of the members; or

    (d) In accordance with paragraph 22 to undertake reviews of the operation of this Convention.

    Except in the case of subparagraph (d), the special session shall be convened not later than 30 days after receipt of the request by the Director-General of the Technical Secretariat, unless specified otherwise in the request.

13. The Conference shall also be convened in the form of an Amendment Conference in accordance with Article XV, paragraph 2.

14. Sessions of the Conference shall take place at the seat of the Organization unless the Conference decides otherwise.

15. The Conference shall adopt its rules of procedure. At the beginning of each regular session, it shall elect its Chairman and such other officers as may be required. They shall hold office until a new Chairman and other officers are elected at the next regular session.

16. A majority of the members of the Organization shall constitute a quorum for the Conference.

17. Each member of the Organization shall have one vote in the Conference.

18. The Conference shall take decisions on questions of procedure by a simple majority of the members present and voting. Decisions on matters of substance should be taken as far as possible by consensus. If consensus is not attainable when an issue comes up for decision, the Chairman shall defer any vote for 24 hours and during this period of deferment shall make every effort to facilitate achievement of consensus, and shall report to the Conference before the end of this period. If consensus is not possible at the end of 24 hours, the Conference shall take the decision by a two-thirds majority of members present and voting unless specified otherwise in this Convention. When the

issue arises as to whether the question is one of substance or not, that question shall be treated as a matter of substance unless otherwise decided by the Conference by the majority required for decisions on matters of substance.

Powers and functions

19. The Conference shall be the principal organ of the Organization. It shall consider any questions, matters or issues within the scope of this Convention, including those relating to the powers and functions of the Executive Council and the Technical Secretariat. It may make recommendations and take decisions on any questions, matters or issues related to this Convention raised by a State Party or brought to its attention by the Executive Council.

20. The Conference shall oversee the implementation of this Convention, and act in order to promote its object and purpose. The Conference shall review compliance with this Convention. It shall also oversee the activities of the Executive Council and the Technical Secretariat and may issue guidelines in accordance with this Convention to either of them in the exercise of their functions.

21. The Conference shall:

    (a) Consider and adopt at its regular sessions the report, programme and budget of the Organization, submitted by the Executive Council, as well as consider other reports;

(b) Decide on the scale of financial contributions to be paid by States Parties in accordance with paragraph 7;

(c) Elect the members of the Executive Council;

(d) Appoint the Director-General of the Technical Secretariat (hereinafter referred to as "the Director-General");

(e) Approve the rules of procedure of the Executive Council submitted by the latter;

(f) Establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Convention;

(g) Foster international cooperation for peaceful purposes in the field of chemical activities;

(h) Review scientific and technological developments that could affect the operation of this Convention and, in this context, direct the Director-General to establish a Scientific Advisory Board to enable him, in the performance of his functions, to render specialized advice in areas of science and technology relevant to this Convention, to the Conference, the Executive Council or States Parties. The Scientific Advisory Board shall be composed of independent experts appointed in accordance with terms of reference adopted by the Conference;

(i) Consider and approve at its first session any draft agreements, provisions and guidelines developed by the Preparatory Commission;

(j) Establish at its first session the voluntary fund for assistance in accordance with Article X;

(k) Take the necessary measures to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention, in accordance with Article XII.

22. The Conference shall not later than one year after the expiry of the fifth and the tenth year after the entry into force of this Convention, and at such other times within that time period as may be decided upon, convene in special sessions to undertake reviews of the operation of this Convention. Such reviews shall take into account any relevant scientific and technological developments. At intervals of five years thereafter, unless otherwise decided upon, further sessions of the Conference shall be convened with the same objective.

C. THE EXECUTIVE COUNCIL

Composition, procedure and decision-making

23. The Executive Council shall consist of 41 members. Each State Party shall have the right, in accordance with the principle of rotation, to serve on the Executive Council. The members of the Executive Council shall be elected by the Confer-

ence for a term of two years. In order to ensure the effective functioning of this Convention, due regard being specially paid to equitable geographical distribution, to the importance of chemical industry, as well as to political and security interests, the Executive Council shall be composed as follows:

(a) Nine States Parties from Africa to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these nine States Parties, three members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these three members;

(b) Nine States Parties from Asia to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these nine States Parties, four members shall, as a rule, be the States Parties with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these four memebers;

(c) Five States Parties from Eastern Europe to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these five States Parties, one member shall, as a rule, be the State Party with the most significant national chemical industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating this one member;

(d) Seven States Parties from Latin America and the Caribbean to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these seven States Parties, three members shall, as a rule, be the States Parties with the most significant national chemistry industry in the region as determined by internationally reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these three members;

(e) Ten States Parties from among Western European and other States to be designated by States Parties located in this region. As a basis for this designation it is understood that, out of these 10 States Parties, 5 members shall, as a rule, be the States Parties with the most significant national chemistry industry in the region as determined by internationally

reported and published data; in addition, the regional group shall agree also to take into account other regional factors in designating these five members;

(f) One further State Party to be designated consecutively by States Parties located in the regions of Asia and Latin America and the Caribbean. As a basis for this designation it is understood that this State Party shall be a rotating member from these regions.

24. For the first election of the Executive Council 20 members shall be elected for a term of one year, due regard being paid to the established numerical proportions as described in paragraph 23.

25. After the full implementation of Articles IV and V the Conference may, upon the request of a majority of the members of the Executive Council, review the composition of the Executive Council taking into account developments related to the principles specified in paragraph 23 that are governing its composition.

26. The Executive Council shall elaborate its rules of procedure and submit them to the Conference for approval.

27. The Executive Council shall elect its Chairman from among its members.

28. The Executive Council shall meet for regular sessions. Between regular sessions it shall meet

as often as may be required for the fulfilment of its powers and functions.

29. Each member of the Executive Council shall have one vote. Unless otherwise specified in this Convention, the Executive Council shall take decisions on matters of substance by a two-thirds majority of all its members. The Executive Council shall take decisions on questions of procedure by a simple majority of all its members. When the issue arises as to whether the question is one of substance or not, that question shall be treated as a matter of substance unless otherwise decided by the Executive Council by the majority required for decisions on matters of substance.

Powers and functions

30. The Executive Council shall be the executive organ of the Organization. It shall be responsible to the Conference. The Executive Council shall carry out the powers and functions entrusted to it under this Convention, as well as those functions delegated to it by the Conference. In so doing, it shall act in conformity with the recommendations, decisions and guidelines of the Conference and assure their proper and continuous implementation.

31. The Executive Council shall promote the effective implementation of, and compliance with, this Convention. It shall supervise the activities of the Technical Secretariat, cooperate with the National Authority of each State Party and facilitate con-

sultations and cooperation among States Parties at their request.

32. The Executive Council shall:

(a) Consider and submit to the Conference the draft programme and budget of the Organization;

(b) Consider and submit to the Conference the draft report of the Organization on the implementation of this Convention, the report on the performance of its own activities and such special reports as it deems necessary or which the Conference may request;

(c) Make arrangements for the sessions of the Conference including the preparation of the draft agenda.

33. The Executive Council may request the convening of a special session of the Conference.

34. The Executive Council shall:

(a) Conclude agreements or arrangements with States and international organizations on behalf of the Organization, subject to prior approval by the Conference;

(b) Conclude agreements with States Parties on behalf of the Organization in connection with Article X and supervise the voluntary fund referred to in Article X;

(c) Approve agreements or arrangements relating to the implementation of verification activities,

negotiated by the Technical Secretariat with States Parties.

35. The Executive Council shall consider any issue or matter within its competence affecting this Convention and its implementation, including concerns regarding compliance, and cases of non-compliance, and, as appropriate, inform States Parties and bring the issue or matter to the attention of the Conference.

36. In its consideration of doubts or concerns regarding compliance and cases of non-compliance, including, inter alia, abuse of the rights provided for under this Convention, the Executive Council shall consult with the States Parties involved and, as appropriate, request the State Party to take measures to redress the situation within a specified time. To the extent that the Executive Council considers further action to be necessary, it shall take, inter alia, one or more of the following measures:

(a) Inform all States Parties of the issue or matter;

(b) Bring the issue or matter to the attention of the Conference;

(c) Make recommendations to the Conference regarding measures to redress the situation and to ensure compliance.

The Executive Council shall, in cases of particular gravity and urgency, bring the issue or matter, in-

cluding relevant information and conclusions, directly to the attention of the United Nations General Assembly and the United Nations Security Council. It shall at the same time inform all States Parties of this step.

D. THE TECHNICAL SECRETARIAT

37. The Technical Secretariat shall assist the Conference and the Executive Council in the performance of their functions. The Technical Secretariat shall carry out the verification measures provided for in this Convention. It shall carry out the other function entrusted to it under this Convention as well as those functions delegated to it by the Conference and the Executive Council.

38. The Technical Secretariat shall:

(a) Prepare and submit to the Executive Council the draft programme and budget of the Organization;

(b) Prepare and submit to the Executive Council the draft report of the Organization on the implementation of this Convention and such other reports as the Conference or the Executive Council may request;

(c) Provide administrative and technical support to the Conference, the Executive Council and subsidiary organs;

(d) Address and receive communications on behalf of the Organization to and from States Parties

on matters pertaining to the implementation of this Convention;

(e) Provide technical assistance and technical evaluation to States Parties in the implementation of the provisions of this Convention, including evaluation of scheduled and unscheduled chemicals.

39. The Technical Secretariat shall:

(a) Negotiate agreements or arrangements relating to the implementation of verification activities with States Parties, subject to approval by the Executive Council;

(b) Not later than 180 days after entry into force of this Convention, coordinate the establishment and maintenance of permanent stockpiles of emergency and humanitarian assistance by States Parties in accordance with Article X, paragraphs 7 (b) and (c). The Technical Secretariat may inspect the items maintained for serviceability. Lists of items to be stockpiled shall be considered and approved by the Conference pursuant to paragraph 21 (i) above;

(c) Administer the voluntary fund referred to in Article X, compile declarations made by the States Parties and register, when requested, bilateral agreements concluded between States Parties or between a State Party and the Organization for the purposes of Article X.

40. The Technical Secretariat shall inform the Executive Council of any problem that has arisen with regard to the discharge of its functions, including doubts, ambiguities or uncertainties about compliance with this Convention that have come to its notice in the performance of its verification activities and that it has been unable to resolve or clarify through its consultations with the State Party concerned.

41. The Technical Secretariat shall comprise a Director-General, who shall be its head and chief administrative officer, inspectors and such scientific, technical and other personnel as may be required.

42. The Inspectorate shall be a unit of the Technical Secretariat and shall act under the supervision of the Director-General.

43. The Director-General shall be appointed by the Conference upon the recommendation of the Executive Council for a term of four years, renewable for one further term, but not thereafter.

44. The Director-General shall be responsible to the Conference and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Only citizens of States Parties shall

serve as the Director-General, as inspectors or as other members of the professional and clerical staff. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. Recruitment shall be guided by the principle that the staff shall be kept to a minimum necessary for the proper discharge of the responsibilities of the Technical Secretariat.

45. The Director-General shall be responsible for the organization and functioning of the Scientific Advisory Board referred to in paragraph 21 (h). The Director-General shall, in consultation with States Parties, appoint members of the Scientific Advisory Board, who shall serve in their individual capacity. The members of the Board shall be appointed on the basis of their expertise in the particular scientific fields relevant to the implementation of this Convention. The Director-General may also, as appropriate, in consultation with members of the Board, establish temporary working groups of scientific experts to provide recommendations on specific issues. In regard to the above, States Parties may submit lists of experts to the Director-General.

46. In the performance of their duties, the Director-General, the inspectors and the other members of the staff shall not seek or receive instruction from any Government or from any other source external to the Organization. They shall refrain from any action that might reflect on their positions as in-

ternational officers responsible only to the Conference and the Executive Council.

47. Each State Party shall respect the exclusively international character of the responsibilities of the Director-General, the inspectors and the other members of the staff and not seek to influence them in the discharge of their responsibilities.

E. PRIVILEGES AND IMMUNITIES

48. The Organization shall enjoy on the territory and in any other place under the jurisdiction or control of a State Party such legal capacity and such privileges and immunities as are necessary for the exercise of its functions.

49. Delegates of States Parties, together with their alternates and advisers, representatives appointed to the Executive Council together with their alternates and advisers, the Director-General and the staff of the Organization shall enjoy such privileges and immunities as are necessary in the independent exercise of their functions in connection with the Organization.

50. The legal capacity, privileges, and immunities referred to in this Article shall be defined in agreements between the Organization and the States Parties as well as in an agreement between the Organization and the State in which the headquarters of the Organization is seated. These agreements shall be considered and approved by the Conference pursuant to paragraph 21 (i).

51. Notwithstanding paragraphs 48 and 49, the privileges and immunities enjoyed by the Director-General and the staff of the Technical Secretariat during the conduct of verification activities shall be those set forth in Part II, Section B, of the Verification Annex.

ARTICLE IX

CONSULTATIONS, COOPERATION AND FACT-FINDING

1. States Parties shall consult and cooperate, directly among themselves, or through the Organization or other appropriate international procedures, including procedures within the framework of the United Nations and in accordance with its Charter, on any matter which may be raised relating to the object and purpose, or the implementation of the provisions, of this Convention.

2. Without prejudice to the right of any State Party to request a challenge inspection, States Parties should, whenever possible, first make every effort to clarify and resolve, through exchange of information and consultations among themselves, any matter which may cause doubt about compliance with this Convention, or which gives rise to concerns about a related matter which may be considered ambiguous. A State Party which receives a request from another State Party for clarification of any matter which the requesting State Party believes causes such a doubt or concern shall provide the requesting State Party as soon as pos-

sible, but in any case not later than 10 days after the request, with information sufficient to answer the doubt or concern raised along with an explanation of how the information provided resolves the matter. Nothing in this Convention shall affect the right of any two or more States Parties to arrange by mutual consent for inspections or any other procedures among themselves to clarify and resolve any matter which may cause doubt about compliance or gives rise to a concern about a related matter which may be considered ambiguous. Such arrangements shall not affect the rights and obligations of any State Party under other provisions of this Convention.

Procedure for requesting clarification

3. A State Party shall have the right to request the Executive Council to assist in clarifying any situation which may be considered ambiguous or which gives rise to a concern about the possible non-compliance of another State Party with this Convention. The Executive Council shall provide appropriate information in its possession relevant to such a concern.

4. A State Party shall have the right to request the Executive Council to obtain clarification from another State party on any situation which may be considered ambiguous or which gives rise to a concern about its possible non-compliance with this Convention. In such a case, the following shall apply:

(a) The Executive Council shall forward the request for clarification to the State Party concerned through the Director-General not later than 24 hours after its receipt;

(b) The requested State Party shall provide the clarification to the Executive Council as soon as possible, but in any case not later than 10 days after the receipt of the request;

(c) The Executive Council shall take note of the clarification and forward it to the requesting State Party not later than 24 hours after its receipt;

(d) If the requesting State Party deems the clarification to be inadequate, it shall have the right to request the Executive Council to obtain from the requested State Party further clarification;

(e) For the purpose of obtaining further clarification requested under subparagraph (d), the Executive Council may call on the Director-General to establish a group of experts from the Technical Secretariat, or if appropriate staff are not available in the Technical Secretariat, from elsewhere, to examine all available information and data relevant to the situation causing the concern. The group of experts shall submit a factual report to the Executive Council on its findings;

(f) If the requesting State Party considers the clarification obtained under subparagraphs (d)

and (e) to be unsatisfactory, it shall have the right to request a special session of the Executive Council in which States Parties involved that are not members of the Executive Council shall be entitled to take part. In such a special session, the Executive Council shall consider the matter and may recommend any measure it deems appropriate to resolve the situation.

5. A State Party shall also have the right to request the Executive Council to clarify any situation which has been considered ambiguous or has given rise to a concern about its possible non-compliance with this Convention. The Executive Council shall respond by providing such assistance as appropriate.

6. The Executive Council shall inform the States Parties about any request for clarification provided in this Article.

7. If the doubt or concern of a State Party about a possible non-compliance has not been resolved within 60 days after the submission of the request for clarification to the Executive Council, or it believes its doubts warrant urgent consideration, notwithstanding its right to request a challenge inspection, it may request a special session of the Conference in accordance with Article VIII, paragraph 12 (c). At such a special session, the Conference shall consider the matter and may recom-

mend any measure it deems appropriate to resolve the situation.

Procedures for challenge inspections

8. Each State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this Convention, and to have this inspection conducted anywhere without delay by an inspection team designated by the Director-General and in accordance with the Verification Annex.

9. Each State Party is under the obligation to keep the inspection request within the scope of this Convention and to provide in the inspection request all appropriate information on the basis of which a concern has arisen regarding possible non-compliance with this Convention as specified in the Verification Annex. Each State Party shall refrain from unfounded inspection requests, care being taken to avoid abuse. The challenge inspection shall be carried out for the sole purpose of determining facts relating to the possible non-compliance.

10. For the purpose of verifying compliance with the provisions of this Convention, each State Party shall permit the Technical Secretariat to conduct

the on-site challenge inspection pursuant to paragraph 8.

11. Pursuant to a request for a challenge inspection of a facility or location, and in accordance with the procedures provided for in the Verification Annex, the inspected State Party shall have:

    (a) The right and the obligation to make every reasonable effort to demonstrate its compliance with this Convention and, to this end, to enable the inspection team to fulfil its mandate;

    (b) The obligation to provide access within the requested site for the sole purpose of establishing facts relevant to the concern regarding possible non-compliance; and

    (c) The right to take measures to protect sensitive installations, and to prevent disclosure of confidential information and data, not related to this Convention.

12. With regard to an observer, the following shall apply:

    (a) The requesting State Party may, subject to the agreement of the inspected State Party, send a representative who may be a national either of the requesting State Party or of a third State Party, to observe the conduct of the challenge inspection.

(b) The inspected State Party shall then grant access to the observer in accordance with the Verification Annex.

(c) The inspected State Party shall, as a rule, accept the proposed observer, but if the inspected State Party exercises a refusal, that fact shall be recorded in the final report.

13. The requesting State Party shall present an inspection request for an on-site challenge inspection to the Executive Council and at the same time to the Director-General for immediate processing.

14. The Director-General shall immediately ascertain that the inspection request meets the requirements specified in Part X, paragraph 4, of the Verification Annex, and, if necessary, assist the requesting State Party in filing the inspection request accordingly. When the inspection request fulfils the requirements, preparations for the challenge inspection shall begin.

15. The Director-General shall transmit the inspection request to the inspected State Party not less than 12 hours before the planned arrival of the inspection team at the point of entry.

16. After having received the inspection request, the Executive Council shall take cognizance of the Director-General's actions on the request and shall keep the case under its consideration throughout the inspection procedure. However, its deliberations shall not delay the inspection process.

17. The Executive Council may, not later than 12 hours after having received the inspection request, decide by a three-quarter majority of all its members against carrying out the challenge inspection, if it considers the inspection request to be frivolous, abusive or clearly beyond the scope of this Convention as described in paragraph 8. Neither the requesting nor the inspected State Party shall participate in such a decision. If the Executive Council decides against the challenge inspection, preparations shall be stopped, no further action on the inspection request shall be taken, and the States Parties concerned shall be informed accordingly.

18. The Director-General shall issue an inspection mandate for the conduct of the challenge inspection. The inspection mandate shall be the inspection request referred to in paragraphs 8 and 9 put into operational terms, and shall conform with the inspection request.

19. The challenge inspection shall be conducted in accordance with Part X or, in the case of alleged use, in accordance with Part XI of the Verification Annex. The inspection team shall be guided by the principle of conducting the challenge inspection in the least intrusive manner possible, consistent with the effective and timely accomplishment of its mission.

20. The inspected State Party shall assist the inspection team throughout the challenge inspection and

facilitate its task. If the inspected State Party proposes, pursuant to Part X, Section C, of the Verification Annex, arrangements to demonstrate compliance with this Convention, alternative to full and comprehensive access, it shall make every reasonable effort, through consultations with the inspection team, to reach agreement on the modalities for establishing the facts with the aim of demonstrating its compliance.

21. The final report shall contain the factual findings as well as an assessment by the inspection team of the degree and nature of access and cooperation granted for the satisfactory implementation of the challenge inspection. The Director-General shall promptly transmit the final report of the inspection team to the requesting State Party, to the inspected State Party, to the Executive Council and to all other State Parties. The Director-General shall further transmit promptly to the Executive Council the assessments of the requesting and of the inspected States Parties, as well as the views of other States Parties which may be conveyed to the Director-General for that purpose, and then provide them to all States Parties.

22. The Executive Council shall, in accordance with its powers and functions, review the final report of the inspection team as soon as it is presented, and address any concerns as to:

(a) Whether any non-compliance has occurred;

(b) Whether the request had been within the scope of this Convention; and

(c) Whether the right to request a challenge inspection had been abused.

23. If the Executive Council reaches the conclusion, in keeping with its powers and functions, that further action may be necessary with regard to paragraph 22, it shall take the appropriate measures to redress the situation and to ensure compliance with this Convention, including specific recommendations to the Conference. In the case of abuse, the Executive Council shall examine whether the requesting State Party should bear any of the financial implications of the challenge inspection.

24. The requesting State Party and the inspected State Party shall have the right to participate in the review process. The Executive Council shall inform the States Parties and the next session of the Conference of the outcome of the process.

25. If the Executive Council has made specific recommendations to the Conference, the Conference shall consider action in accordance with Article XII.

ARTICLE X

ASSISTANCE AND PROTECTION AGAINST CHEMICAL WEAPONS

1. For the purposes of this Article, "Assistance" means the coordination and delivery to States Parties of protection against chemical weapons, in-

cluding, inter alia, the following: detection equipment and alarm systems; protective equipment; decontamination equipment and decontaminants; medical antidotes and treatments; and advice on any of these protective measures.

2. Nothing in this Convention shall be interpreted as impeding the right of any State Party to conduct research into, develop, produce, acquire, transfer or use means of protection against chemical weapons, for purposes not prohibited under this Convention.

3. Each State Party undertakes to facilitate, and shall have the right to participate in, the fullest possible exchange of equipment, material and scientific and technological information concerning means of protection against chemical weapons.

4. For the purposes of increasing the transparency of national programmes related to protective purposes, each State Party shall provide annually to the Technical Secretariat information on its programme, in accordance with procedures to be considered and approved by the Conference pursuant to Article VIII, paragraph 21 (i).

5. The Technical Secretariat shall establish, not later than 180 days after entry into force of this Convention and maintain, for the use of any requesting State Party, a data bank containing freely available information concerning various means of protection against chemical weapons as well as such information as may be provided by States Parties.

The Technical Secretariat shall also, within the resources available to it, and at the request of a State Party, provide expert advice and assist the State Party in identifying how its programmes for the development and improvement of a protective capacity against chemical weapons could be implemented.

6. Nothing in this Convention shall be interpreted as impeding the right of States Parties to request and provide assistance bilaterally and to conclude individual agreements with other States Parties concerning the emergency procurement of assistance.

7. Each State Party undertakes to provide assistance through the Organization and to this end to elect to take one or more of the following measures:

   (a) To contribute to the voluntary fund for assistance to be established by the Conference at its first session;

   (b) To conclude, if possible not later than 180 days after this Convention enters into force for it, agreements with the Organization concerning the procurement, upon demand, of assistance;

   (c) To declare, not later than 180 days after this Convention enters into force for it, the kind of assistance it might provide in response to an appeal by the Organization. If, however, a State Party subsequently is unable to provide the assistance envisaged in its declaration, it is

still under the obligation to provide assistance in accordance with this paragraph.

8. Each State Party has the right to request and, subject to the procedures set forth in paragraphs 9, 10 and 11, to receive assistance and protection against the use or threat of use of chemical weapons if it considers that:

   (a) Chemical weapons have been used against it;

   (b) Riot control agents have been used against it as a method of warfare; or

   (c) It is threatened by actions or activities of any State that are prohibited for States Parties by Article I.

9. The request, substantiated by relevant information, shall be submitted to the Director-General, who shall transmit it immediately to the Executive Council and to all States Parties. The Director-General shall immediately forward the request to States Parties which have volunteered, in accordance with paragraphs 7 (b) and (c), to dispatch emergency assistance in case of use of chemical weapons or use of riot control agents as a method of warfare, or humanitarian assistance in case of serious threat of use of chemical weapons or serious threat of use of riot control agents as a method of warfare to the State Party concerned not later than 12 hours after receipt of the request. The Director-General shall initiate, not later than 24 hours after receipt of the request, an investigation in order to provide foundation for further action.

He shall complete the investigation within 72 hours and forward a report to the Executive Council. If additional time is required for completion of the investigation, an interim report shall be submitted within the same time-frame. The additional time required for investigation shall not exceed 72 hours. It may, however, be further extended by similar periods. Reports at the end of each additional period shall be submitted to the Executive Council. The investigation shall, as appropriate and in conformity with the request and the information accompanying the request, establish relevant facts related to the request as well as the type and scope of supplementary assistance and protection needed.

10. The Executive Council shall meet not later than 24 hours after receiving an investigation report to consider the situation and shall take a decision by simple majority within the following 24 hours on whether to instruct the Technical Secretariat to provide supplementary assistance. The Technical Secretariat shall immediately transmit to all States Parties and relevant international organizations the investigation report and the decision taken by the Executive Council. When so decided by the Executive Council, the Director-General shall provide assistance immediately. For this purpose, the Director-General may cooperate with the requesting State Party, other States Parties and relevant international organizations. The

States Parties shall make the fullest possible efforts to provide assistance.

11. If the information available from the ongoing investigation or other reliable sources would give sufficient proof that there are victims of use of chemical weapons and immediate action is indispensable, the Director-General shall notify all States Parties and shall take emergency measures of assistance, using the resources the Conference has placed at his disposal for such contingencies. The Director-General shall keep the Executive Council informed of actions undertaken pursuant to this paragraph.

ARTICLE XI

ECONOMIC AND TECHNOLOGICAL DEVELOPMENT

1. The provisions of this Convention shall be implemented in a manner which avoids hampering the economic or technological development of States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention.

2. Subject to the provisions of this Convention and without prejudice to the principles and applicable rules of international law, the States Parties shall:

(a) Have the right, individually or collectively, to conduct research with, to develop, produce, acquire, retain, transfer, and use chemicals;

(b) Undertake to facilitate, and have the right to participate in, the fullest possible exchange of chemicals, equipment and scientific and technical information relating to the development and application of chemistry for purposes not prohibited under this Convention.

(c) Not maintain among themselves any restrictions, including those in any international agreements, incompatible with the obligations undertaken under this Convention, which would restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;

(d) Not use this Convention as grounds for applying any measures other than those provided for, or permitted, under this Convention nor use any other international agreement for pursuing an objective inconsistent with this Convention;

(e) Undertake to review their existing national regulations in the field of trade in chemicals in order to render them consistent with the object and purpose of this Convention.

ARTICLE XII

MEASURES TO REDRESS A SITUATION AND TO ENSURE COMPLIANCE, INCLUDING SANCTIONS

1. The Conference shall take the necessary measures, as set forth in paragraphs 2, 3 and 4, to ensure compliance with this Convention and to redress and remedy any situation which contravenes the provisions of this Convention. In considering action pursuant to this paragraph, the Conference shall take into account all information and recommendations on the issues submitted by the Executive Council.

2. In cases where a State Party has been requested by the Executive Council to take measures to redress a situation raising problems with regard to its compliance, and where the State Party fails to fulfil the request within the specified time, the Conference may, inter alia, upon the recommendation of the Executive Council, restrict or suspend the State Party's rights and privileges under this Convention until it undertakes the necessary action to conform with its obligations under this Convention.

3. In cases where serious damage to the object and purpose of this Convention may result from activities prohibited under this Convention, in particular by Article I, the Conference may recommend collective measures to States Parties in conformity with international law.

4. The Conference shall, in cases of particular gravity, bring the issue, including relevant information and conclusions, to the attention of the United Nations General Assembly and the United Nations Security Council.

ARTICLE XIII

RELATION TO OTHER INTERNATIONAL AGREEMENTS

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and under the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, signed at London, Moscow and Washington on 10 April 1972.

ARTICLE XIV

SETTLEMENT OF DISPUTES

1. Disputes that may arise concerning the application or the interpretation of this Convention shall be settled in accordance with the relevant provisions of this Convention and in conformity with the provisions of the Charter of the United Nations.

2. When a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the interpretation or

application of this Convention, the parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of the parties' choice, including recourse to appropriate organs of this Convention and, by mutual consent, referral to the International Court of Justice in conformity with the Statute of the Court. The States Parties involved shall keep the Executive Council informed of actions being taken.

3. The Executive Council may contribute to the settlement of a dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to start the settlement process of their choice and recommending a time-limit for any agreed procedure.

4. The Conference shall consider questions related to disputes raised by States Parties or brought to its attention by the Executive Council. The Conference shall, as it finds necessary, establish or entrust organs with tasks related to the settlement of these disputes in conformity with Article VIII, paragraph 21 (f).

5. The Conference and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Or-

ganization and the United Nations shall be concluded for this purpose in accordance with Article VIII, paragraph 34 (a).

6. This Article is without prejudice to Article IX or to the provisions on measures to redress a situation and to ensure compliance, including sanctions.

ARTICLE XV

AMENDMENTS

1. Any State Party may propose amendments to this Convention. Any State Party may also propose changes, as specified in paragraph 4, to the Annexes of this Convention. Proposals for amendments shall be subject to the procedures in paragraphs 2 and 3. Proposals for changes, as specified in paragraph 4, shall be subject to the procedures in paragraph 5.

2. The text of a proposed amendment shall be submitted to the Director-General for circulation to all States Parties and to the Depositary. The proposed amendment shall be considered only by an Amendment Conference. Such an Amendment Conference shall be convened if one third or more of the States Parties notify the Director-General not later than 30 days after its circulation that they support further consideration of the proposal. The Amendment Conference shall be held immediately following a regular session of the Conference unless the requesting States Parties ask for an earlier meeting. In no case shall an Amend-

ment Conference be held less than 60 days after the circulation of the proposed amendment.

3. Amendments shall enter into force for all States Parties 30 days after deposit of the instruments of ratification or acceptance by all the States Parties referred to under subparagraph (b) below:

   (a) When adopted by the Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative vote; and

   (b) Ratified or accepted by all those States Parties casting a positive vote at the Amendment Conference.

4. In order to ensure the viability and the effectiveness of this Convention, provisions in the Annexes shall be subject to changes in accordance with paragraph 5, if proposed changes are related only to matters of an administrative or technical nature. All changes to the Annex on Chemicals shall be made in accordance with paragraph 5. Sections A and C of the Confidentiality Annex, Part X of the Verification Annex, and those definitions in Part I of the Verification Annex which relate exclusively to challenge inspections, shall not be subject to changes in accordance with paragraph 5.

5. Proposed changes referred to in paragraph 4 shall be made in accordance with the following procedures:

(a) The text of the proposed changes shall be transmitted together with the necessary information to the Director-General. Additional information for the evaluation of the proposal may be provided by any State Party and the Director-General. The Director-General shall promptly communicate any such proposals and information to all States Parties, the Executive Council and the Depositary;

(b) Not later than 60 days after its receipt, the Director-General shall evaluate the proposal to determine all its possible consequences for the provisions of this Convention and its implementation and shall communicate any such information to all States Parties and the Executive Council;

(c) The Executive Council shall examine the proposal in the light of all information available to it, including whether the proposal fulfils the requirements of paragraph 4. Not later than 90 days after its receipt, the Executive Council shall notify its recommendation, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;

(d) If the Executive Council recommends to all States Parties that the proposal be adopted, it shall be considered approved if no State Party objects to it within 90 days after receipt of the

recommendation. If the Executive Council recommends that the proposal be rejected, it shall be considered rejected if no State Party objects to the rejection within 90 days after receipt of the recommendation;

(e) If a recommendation of the Executive Council does not meet with the acceptance required under subparagraph (d), a decision on the proposal, including whether it fulfils the requirements of paragraph 4, shall be taken as a matter of substance by the Conference at its next session;

(f) The Director-General shall notify all States Parties and the Depositary of any decision under this paragraph;

(g) Changes approved under this procedure shall enter into force for all States Parties 180 days after the date of notification by the Director-General of their approval unless another time period is recommended by the Executive Council or decided by the Conference.

ARTICLE XVI

DURATION AND WITHDRAWAL

1. This Convention shall be of unlimited duration.

2. Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject-matter of this Convention, have jeopardized the supreme interests of its

country. It shall give notice of such withdrawal 90 days in advance to all other States Parties, the Executive Council, the Depositary and the United Nations Security Council. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

3. The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law, particularly the Geneva Protocol of 1925.

ARTICLE XVII

STATUS OF THE ANNEXES

The Annexes form an integral part of this Convention. Any reference to this Convention includes the Annexes.

ARTICLE XVIII

SIGNATURE

This Convention shall be open for signature for all States before its entry into force.

ARTICLE XIX

RATIFICATION

This Convention shall be subject to ratification by States Signatories according to their respective constitutional processes.

ARTICLE XX

ACCESSION

Any State which does not sign this Convention before its entry into force may accede to it at any time thereafter.

ARTICLE XXI

ENTRY INTO FORCE

1. This Convention shall enter into force 180 days after the date of the deposit of the 65th instrument of ratification, but in no case earlier than two years after its opening for signature.

2. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the 30th day following the date of deposit of their instrument of ratification or accession.

ARTICLE XXII

RESERVATIONS

The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose.

ARTICLE XXIII

DEPOSITARY

The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention and shall, inter alia:

(a) Promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession and the date of the entry into force of this Convention, and of the receipt of other notices;

(b) Transmit duly certified copies of this Convention to the Governments of all signatory and acceding States; and

(c) Register this Convention pursuant to Article 102 of the Charter of the United Nations.

ARTICLE XXIV

AUTHENTIC TEXTS

This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF the undersigned, being duly authorized to the effect, have signed this Convention.

Done at Paris on the thirteenth day of January, one thousand nine hundred and ninety-three.

9. The Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, Div. I, 112 Stat. 2681-856 provides:

DIVISION I—CHEMICAL WEAPONS CONVENTION

SECTION 1. SHORT TITLE.

This Division may be cited as the "Chemical Weapons Convention Implementation Act of 1998".

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

Sec. 1. Short title.

Sec. 2. Table of contents.

Sec. 3. Definitions.

TITLE I—GENERAL PROVISIONS

Sec. 101. Designation of United States National Authority.

Sec. 102. No abridgement of constitutional rights.

Sec. 103. Civil liability of the United States.

TITLE II—PENALTIES FOR UNLAWFUL ACTIVITIES SUBJECT TO THE JURISDICTION OF THE UNITED STATES

Subtitle A—Criminal and Civil Penalties

Sec. 201. Criminal and civil provisions.

Subtitle B—Revocations of Export Privileges

Sec. 211. Revocations of export privileges.

TITLE III—INSPECTIONS

Sec. 301. Definitions in the title.

Sec. 302. Facility agreements.

Sec. 303. Authority to conduct inspections.

Sec. 304. Procedures for inspections.

Sec. 305. Warrants.

Sec. 306. Prohibited acts relating to inspections.

Sec. 307. National security exception.

Sec. 308. Protection of constitutional rights of contractors.

Sec. 309. Annual report on inspections.

Sec. 310. United States assistance in inspections at private facilities.

TITLE IV—REPORTS

Sec. 401. Reports required by the United States National Authority.

Sec. 402. Prohibition relating to low concentrations of schedule 2 and 3 chemicals.

Sec. 403. Prohibition relating to unscheduled discrete organic chemicals and coincidental byproducts in waste streams.

Sec. 404. Confidentiality of information.

Sec. 405. Recordkeeping violations.

TITLE V—ENFORCEMENT

Sec. 501. Penalties.

Sec. 502. Specific enforcement.

Sec. 503. Expedited judicial review.

TITLE VI—MISCELLANEOUS PROVISIONS

Sec. 601. Repeal.

Sec. 602. Prohibition.

Sec. 603. Bankruptcy actions.

SEC. 3. DEFINITIONS. [22 U.S.C. 6701]

In this Act:

(1) CHEMICAL WEAPON.—The term "chemical weapon" means the following, together or separately:

(A) A toxic chemical and its precursors, except where intended for a purpose not prohibited under this Act as long as the type and quantity is consistent with such a purpose.

(B) A munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in subparagraph (A), which would be released as a result of the employment of such munition or device.

(C) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in subparagraph (B).

(2) CHEMICAL WEAPONS CONVENTION; CONVENTION.—The terms "Chemical Weapons Convention" and "Convention" mean the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993.

(3) KEY COMPONENT OF A BINARY OR MULTICOMPONENT CHEMICAL SYSTEM.—The term "key component of a binary or multicomponent chemical system" means the precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

(4) NATIONAL OF THE UNITED STATES.—The term "national of the United States" has the same meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

(5) ORGANIZATION.—The term "Organization" means the Organization for the Prohibition of Chemical Weapons.

(6) PERSON.—The term "person", except as otherwise provided, means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

(7) PRECURSOR.—

(A) IN GENERAL.—The term "precursor" means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. The term includes any key component of a binary or multicomponent chemical system.

(B) LIST OF PRECURSORS.—Precursors which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

(8) PURPOSES NOT PROHIBITED BY THIS ACT.—The term "purposes not prohibited by this Act" means the following:

(A) PEACEFUL PURPOSES.—Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.

(B) PROTECTIVE PURPOSES.—Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.

(C) UNRELATED MILITARY PURPOSES.—Any military purpose of the United States that is not connected with the use of a chemical weapon and that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm.

(D) LAW ENFORCEMENT PURPOSES.—Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

(9) TECHNICAL SECRETARIAT.—The term "Technical Secretariat" means the Technical Secretariat of the Organization for the Prohibition of Chemical Weapons established by the Chemical Weapons Convention.

(10) SCHEDULE 1 CHEMICAL AGENT.—The term 'Schedule 1 chemical agent' means any of the following, together or separately:

(A) O-Alkyl ($\leq C_{10}$, incl. cycloalkyl) alkyl

(Me, Et, n-Pr or i-Pr)-phosphonofluoridates

(e.g. Sarin: O-Isopropyl methylphosphonofluoridate

Soman: O-Pinacolyl methylphosphonofluoridate).

(B) O-Alkyl ($\leq C_{10}$, incl. cycloalkyl) N,N-dialkyl

(Me, Et, n-Pr or i-Pr)-phosphoramidocyanidates

(e.g. Tabnn: O-Ethyl N,N-dimethyl phosphoramidocyanidate).

(C) O-Alkyl (H or $\leq C_{10}$, incl. cycloalkyl) S-2-dialkyl

(Me, Et, n-Pr or i-Pr)-aminoethyl alkyl

(Me, Et, n-Pr or i-Pr) phosphonothiolates and corresponding alkylated or protonated salts

(e.g. VX: O-Ethyl S-2-diisopropylaminoethyl methyl phosphonothiolate).

(D) Sulfur mustards:

2-Chloroethylchloromethylsulfide

Mustard gas: (Bis(2-chloroethyl)sulfide

Bis(2-chloroethylthio)methane

Sesquimustard: 1,2-Bis(2-chloroethylthio) ethane

1,3Bis(2-chloroethylthio)-n-propane

1,4Bis(2-chloroethylthio)-n-butane

1,5Bis(2-chloroethylthio)-n-pentane

Bis(2-chloroethylthiomethyl)ether

O-Mustard: Bis(2-chloroethylthioethyl) ether.

(E) Lewisites:

Lewisite 1: 2-Chlorovinyldichloroarsine

Lewisite 2: Bis(2-chlorovinyl)chloroarsine

Lewisite 3: Tris (2-clorovinyl)arsine.

(F) Nitrogen mustards:

HN1: Bis(2-chloroethyl)ethylamine

HN2: Bis(2-chloroethyl)methylamine

HN3: Tris(2-chloroethyl)amine.

(G) Saxitoxin.

(H) Ricin.

(I) Alkyl (Me, Et, n-Pr or i-Pr) phosphonyldi-

fluorides

e.g. DF: Methylphosphonyldifluoride.

(J) O-Alkyl (H or $\leq C_{10}$, incl. cycloalkyl)O-2-dialkyl

(Me, Et, n-Pr or i-Pr)-aminoethyl alkyl

(Me, Et, n-Pr or i-Pr) phosphonites and corresponding alkylated or protonated salts

e.g. QL: O-Ethyl O-2-diisopropylaminoethyl methylphosphonite.

(K) Chlorosarin: O-Isopropyl methylphosphonochloridate.

(L) Chlorosoman: O-Pinacolyl methylphosphonochloridate.

(11) SCHEDULE 2 CHEMICAL AGENT.—The term 'Schedule 2 chemical agent' means the following, together or separately:

(A) Amiton: O,O-Diethyl S-[2-(diethylamino)-ethyl] phosphorothiolate and corresponding alkylated or protonated salts.

(B) PFIB: 1,1,3,3,3-Pentafluoro-2-(trifluoromethyl)-1-propene.

(C) BZ: 3-Quinuclidinyl benzilate

(D) Chemicals, except for those listed in Schedule 1, containing a phosphorus atom to which is bonded one methyl, ethyl or propyl (normal or iso) group but not further carbon atoms,

e.g. Methylphosphonyl dichloride Dimethyl methylphosphonate

Exemption: Fonofos: O-Ethyl S-phenyl ethylphosphonothiolothionate.

(E) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) phosphoramidic dihalides.

(F) Dialkyl (Me, Et, n-Pr or i-Pr) N,N-dialkyl (Me, Et, n-Pr or i-Pr)-phosphoramidates.

(G) arsenic trichloride.

(H) 2,2-Diphenyl-2-hydroxyacetic acid.

(I) Quinuclidine-3-ol.

(J) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethyl-2-chlorides and corresponding protonated salts.

(K) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-ols and corresponding protonated salts

Exemptions: N,N-Dimethylaminoethanol and corresponding protonated salts N, N-Diethylaminoethanol and corresponding protonated salts.

(L) N,N-Dialkyl (Me, Et, n-Pr or i-Pr) aminoethane-2-thiols and corresponding protonated salts.

(M) Thiodiglycol: Bis(2-hydroxyethyl)sulfide.

(N) Pinacolyl alcohol: 3,3-Dimethylbutane-2-ol.

(12) SCHEDULE 3 CHEMICAL AGENT.—The term 'Schedule 3 chemical agent' means any the following, together or separately:

(A) Phosgene: carbonyl dichloride.

(B) Cyanogen chloride.

(C) Hydrogen cyanide.

(D) Chloropicrin: trichloronitromethane.

(E) Phosphorous oxychloride.

(F) Phosphorous trichloride.

(G) Phosphorous pentachloride.

(H) Trimethyl phosphite.

(I) Triethyl phosphite.

(J) Dimethyl phosphite.

(K) Diethyl phosphite.

(L) Sulfur monochloride.

(M) Sulfur dichloride.

(N) Thionyl chloride.

(O) Ethyldiethanolamine.

(P) Methyldiethanolamine.

(Q) Triethanolamine.

(13) TOXIC CHEMICAL.—

(A) IN GENERAL.—The term "toxic chemical" means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and re-

gardless of whether they are produced in facilities, in munitions or elsewhere.

(B) LIST OF TOXIC CHEMICALS.—Toxic chemicals which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

(14) UNITED STATES.—The term "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States and includes all places under the jurisdiction or control of the United States, including—

(A) any of the places within the provisions of paragraph (41) of section 40102 of title 49, United States Code;

(B) any civil aircraft of the United States or public aircraft, as such terms are defined in paragraphs (17) and (37), respectively, of section 40102 of title 49, United States Code; and

(C) any vessel of the United States, as such term is defined in section 3(b) of the Maritime Drug Enforcement Act, as amended (46 U.S.C., App. sec. 1903(b)).

(15) UNSCHEDULED DISCRETE ORGANIC CHEMICAL.—The term "unscheduled discrete organic chemical" means any chemical not listed on any schedule contained in the Annex on Chemicals of the Convention that belongs to the class of chemical compounds consisting of all com-

pounds of carbon, except for its oxides, sulfides, and metal carbonates.

TITLE I—GENERAL PROVISIONS

SEC. 101. DESIGNATION OF UNITED STATES NATIONAL AUTHORITY. [22 U.S.C. 6711]

(a) DESIGNATION.—Pursuant to paragraph 4 of Article VII of the Chemical Weapons Convention, the President shall designate the Department of State to be the United States National Authority.

(b) PURPOSES.—The United States National Authority shall—

(1) serve as the national focal point for effective liaison with the Organization for the Prohibition of Chemical Weapons and other States Parties to the Convention; and

(2) implement the provisions of this Act in coordination with an interagency group designated by the President consisting of the Secretary of Commerce, Secretary of Defense, Secretary of Energy, the Attorney General, and the heads of agencies considered necessary or advisable by the President.

(c) DIRECTOR.—The Secretary of State shall serve as the Director of the United States National Authority.

(d) POWERS.—The Director may utilize the administrative authorities otherwise available to the Secretary of State in carrying out the responsibilities of the Director set forth in this Act.

(e) IMPLEMENTATION.—The President is authorized to implement and carry out the provisions of this Act and the Convention and shall designate through Executive order which agencies of the United States shall issue, amend, or revise the regulations in order to implement this Act and the provisions of the Convention. The Director of the United States National Authority shall report to the Congress on the regulations that have been issued, implemented, or revised pursuant to this section.

SEC. 102. NO ABRIDGEMENT OF CONSTITUTIONAL RIGHTS. [22 U.S.C. 6712]

No person may be required, as a condition for entering into a contract with the United States or as a condition for receiving any benefit from the United States, to waive any right under the Constitution for any purpose related to this Act or the Convention.

SEC. 103. CIVIL LIABILITY OF THE UNITED STATES. [22 U.S.C. 6713]

(a) CLAIMS FOR TAKING OF PROPERTY.—

(1) JURISDICTION OF COURTS OF THE UNITED STATES.—

(A) UNITED STATES COURT OF FEDERAL CLAIMS.—The United States Court of Federal Claims shall, subject to subparagraph (B), have jurisdiction of any civil action or claim against the United States for any taking of property without just compensation that occurs by reason of the action of any officer or employee of the Organization for the Prohibition of Chemical Weapons, including

any member of an inspection team of the Technical Secretariat, or by reason of the action of any officer or employee of the United States pursuant to this Act or the Convention. For purposes of this subsection, action taken pursuant to or under the color of this Act or the Convention shall be deemed to be action taken by the United States for a public purpose.

(B) DISTRICT COURTS.—The district courts of the United States shall have original jurisdiction, concurrent with the United States Court of Federal Claims, of any civil action or claim described in subparagraph (A) that does not exceed $10,000.

(2) NOTIFICATION.—Any person intending to bring a civil action pursuant to paragraph (1) shall notify the United States National Authority of that intent at least one year before filing the claim in the United States Court of Federal Claims. Action on any claim filed during that one-year period shall be stayed. The one-year period following the notification shall not be counted for purposes of any law limiting the period within which the civil action may be commenced.

(3) INITIAL STEPS BY UNITED STATES GOVERNMENT TO SEEK REMEDIES.—During the period between a notification pursuant to paragraph (2) and the filing of a claim covered by the notification in the United States Court of Federal Claims, the United States National Authority shall pursue all diplomatic and other remedies that the United States National

Authority considers necessary and appropriate to seek redress for the claim including, but not limited to, the remedies provided for in the Convention and under this Act.

(4) BURDEN OF PROOF.—In any civil action under paragraph (1), the plaintiff shall have the burden to establish a prima facie case that, due to acts or omissions of any official of the Organization or any member of an inspection team of the Technical Secretariat taken under the color of the Convention, proprietary information of the plaintiff has been divulged or taken without authorization. If the United States Court of Federal Claims finds that the plaintiff has demonstrated such a prima facie case, the burden shall shift to the United States to disprove the plaintiff's claim. In deciding whether the plaintiff has carried its burden, the United States Court of Federal Claims shall consider, among other things—

(A) the value of proprietary information;

(B) the availability of the proprietary information;

(C) the extent to which the proprietary information is based on patents, trade secrets, or other protected intellectual property;

(D) the significance of proprietary information; and

(E) the emergence of technology elsewhere a reasonable time after the inspection.

(b) TORT LIABILITY.—The district courts of the United States shall have exclusive jurisdiction of civil actions for money damages for any tort under the Constitution or any Federal or State law arising from the acts or omissions of any officer or employee of the United States or the Organization, including any member of an inspection team of the Technical Secretariat, taken pursuant to or under color of the Convention or this Act.

(c) WAIVER OF SOVEREIGN IMMUNITY OF THE UNITED STATES.—In any action under subsection (a) or (b), the United States may not raise sovereign immunity as a defense.

(d) AUTHORITY FOR CAUSE OF ACTION.—

(1) UNITED STATES ACTIONS IN UNITED STATES DISTRICT COURT.—Notwithstanding any other law, the Attorney General of the United States is authorized to bring an action in the United States District Court for the District of Columbia against any foreign nation for money damages resulting from that nation's refusal to provide indemnification to the United States for any liability imposed on the United States by virtue of the actions of an inspector of the Technical Secretariat who is a national of that foreign nation acting at the direction or the behest of that foreign nation.

(2) UNITED STATES ACTIONS IN COURTS OUTSIDE THE UNITED STATES.—The Attorney General is authorized to seek any and all available redress in any international tribunal for indemnification to the United States for any liability imposed on the United

States by virtue of the actions of an inspector of the Technical Secretariat, and to seek such redress in the courts of the foreign nation from which the inspector is a national.

(3) ACTIONS BROUGHT BY INDIVIDUALS AND BUSINESSES.—Notwithstanding any other law, any national of the United States, or any business entity organized and operating under the laws of the United States, may bring a civil action in a United States District Court for money damages against any foreign national or any business entity organized and operating under the laws of a foreign nation for an unauthorized or unlawful acquisition, receipt, transmission, or use of property by or on behalf of such foreign national or business entity as a result of any tort under the Constitution or any Federal or State law arising from acts or omissions by any officer or employee of the United States or any member of an inspection team of the Technical Secretariat taken pursuant to or under the color of the Convention or this Act.

(e) RECOUPMENT.—

(1) POLICY.—It is the policy of the United States to recoup all funds withdrawn from the Treasury of the United States in payment for any tort under Federal or State law or taking under the Constitution arising from the acts or omissions of any foreign person, officer, or employee of the Organization, including any member of an inspection team of the Technical Secretariat, taken under color of the Chemical Weapons Convention or this Act.

(2) SANCTIONS ON FOREIGN COMPANIES.—

(A) IMPOSITION OF SANCTIONS.—The sanctions provided in subparagraph (B) shall be imposed for a period of not less than ten years upon—

(i) any foreign person, officer, or employee of the Organization, including any member of an inspection team of the Technical Secretariat, for whose actions or omissions the United States has been held liable for a tort or taking pursuant to this Act; and

(ii) any foreign person or business entity organized and operating under the laws of a foreign nation which knowingly assisted, encouraged or induced, in any way, a foreign person described in clause (i) to publish, divulge, disclose, or make known in any manner or to any extent not authorized by the Convention any United States confidential business information.

(B) Sanctions.—

(i) ARMS EXPORT TRANSACTIONS.—The United States Government shall not sell to a person described in subparagraph (A) any item on the United States Munitions List and shall terminate sales of any defense articles, defense services, or design and construction services to a person described in subparagraph (A) under the Arms Export Control Act.

(ii) SANCTIONS UNDER EXPORT ADMINISTRATION ACT OF 1979.—The authorities under section 6 of the Export Administration Act of 1979 shall be used to prohibit the export of any goods or technology on the control list established pursuant to section 5(c)(1) of that Act to a person described in subparagraph (A).

(iii) INTERNATIONAL FINANCIAL ASSISTANCE.—The United States shall oppose any loan or financial or technical assistance by international financial institutions in accordance with section 701 of the International Financial Institutions Act to a person described in subparagraph (A).

(iv) EXPORT-IMPORT BANK TRANSACTIONS.—The United States shall not give approval to guarantee, insure, or extend credit, or to participate in the extension of credit to a person described in subparagraph (A) through the Export-Import Bank of the United States.

(v) PRIVATE BANK TRANSACTIONS.—Regulations shall be issued to prohibit any United States bank from making any loan or providing any credit to a person described in subparagraph (A).

(vi) BLOCKING OF ASSETS.—The President shall take all steps necessary to block any transactions in any property subject to the jurisdiction of the United States in which a person described in subparagraph (A) has any in-

terest whatsoever, for the purpose of recouping funds in accordance with the policy in paragraph (1).

(vii) DENIAL OF LANDING RIGHTS.—Landing rights in the United States shall be denied to any private aircraft or air carrier owned by a person described in subparagraph (A) except as necessary to provide for emergencies in which the safety of the aircraft or its crew or passengers is threatened.

(3) SANCTIONS ON FOREIGN GOVERNMENTS.—

(A) IMPOSITION OF SANCTIONS.—Whenever the President determines that persuasive information is available indicating that a foreign country has knowingly assisted, encouraged or induced, in any way, a person described in paragraph (2)(A) to publish, divulge, disclose, or make known in any manner or to any extent not authorized by the Convention any United States confidential business information, the President shall, within 30 days after the receipt of such information by the executive branch of Government, notify the Congress in writing of such determination and, subject to the requirements of paragraphs (4) and (5), impose the sanctions provided under subparagraph (B) for a period of not less than five years.

(B) SANCTIONS.—

(i) ARMS EXPORT TRANSACTIONS.—The United States Government shall not sell a country described in subparagraph (A) any

item on the United States Munitions List, shall terminate sales of any defense articles, defense services, or design and construction services to that country under the Arms Export Control Act, and shall terminate all foreign military financing for that country under the Arms Export Control Act.

(ii) DENIAL OF CERTAIN LICENSES.—Licenses shall not be issued for the export to the sanctioned country of any item on the United States Munitions List or commercial satellites.

(iii) DENIAL OF ASSISTANCE.—No appropriated funds may be used for the purpose of providing economic assistance, providing military assistance or grant military education and training, or extending military credits or making guarantees to a country described in subparagraph (A).

(iv) SANCTIONS UNDER EXPORT ADMINISTRATION ACT OF 1979.—The authorities of section 6 of the Export Administration Act of 1979 shall be used to prohibit the export of any goods or technology on the control list established pursuant to section 5(c)(1) of that Act to a country described in subparagraph (A).

(v) INTERNATIONAL FINANCIAL ASSISTANCE.—The United States shall oppose any loan or financial or technical assistance by international financial institutions in accordance

with section 701 of the International Financial Institutions Act to a country described in subparagraph (A).

(vi) TERMINATION OF ASSISTANCE UNDER FOREIGN ASSISTANCE ACT OF 1961.—The United States shall terminate all assistance to a country described in subparagraph (A) under the Foreign Assistance Act of 1961, except for urgent humanitarian assistance.

(vii) PRIVATE BANK TRANSACTIONS.—The United States shall not give approval to guarantee, insure, or extend credit, or participate in the extension of credit through the Export-Import Bank of the United States to a country described in subparagraph (A).

(viii) PRIVATE BANK TRANSACTIONS.—Regulations shall be issued to prohibit any United States bank from making any loan or providing any credit to a country described in subparagraph (A).

(ix) DENIAL OF LANDING RIGHTS.—Landing rights in the United States shall be denied to any air carrier owned by a country described in subparagraph (A), except as necessary to provide for emergencies in which the safety of the aircraft or its crew or passengers is threatened.

(4) SUSPENSION OF SANCTIONS UPON RECOUPMENT BY PAYMENT.—Sanctions imposed under paragraph (2) or (3) may be suspended if the sanctioned

person, business entity, or country, within the period specified in that paragraph, provides full and complete compensation to the United States Government, in convertible foreign exchange or other mutually acceptable compensation equivalent to the full value thereof, in satisfaction of a tort or taking for which the United States has been held liable pursuant to this Act.

(5) WAIVER OF SANCTIONS ON FOREIGN COUNTRIES.—The President may waive some or all of the sanctions provided under paragraph (3) in a particular case if he determines and certifies in writing to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate that such waiver is necessary to protect the national security interests of the United States. The certification shall set forth the reasons supporting the determination and shall take effect on the date on which the certification is received by the Congress.

(6) NOTIFICATION TO CONGRESS.—Not later than five days after sanctions become effective against a foreign person pursuant to this Act, the President shall transmit written notification of the imposition of sanctions against that foreign person to the chairmen and ranking members of the Committee on International Relations of the House of Representatives and the Committee on Foreign Relations of the Senate.

(f) SANCTIONS FOR UNAUTHORIZED DISCLOSURE OF UNITED STATES CONFIDENTIAL BUSINESS INFORM-

ATION.—The Secretary of State shall deny a visa to, and the Attorney General shall exclude from the United States any alien who, after the date of enactment of this Act—

(1) is, or previously served as, an officer or employee of the Organization and who has willfully published, divulged, disclosed, or made known in any manner or to any extent not authorized by the Convention any United States confidential business information coming to him in the course of his employment or official duties, or by reason of any examination or investigation of any return, report, or record made to or filed with the Organization, or any officer or employee thereof, such practice or disclosure having resulted in financial loses or damages to a United States person and for which actions or omissions the United States has been found liable of a tort or taking pursuant to this Act;

(2) traffics in United States confidential business information, a proven claim to which is owned by a United States national;

(3) is a corporate officer, principal, shareholder with a controlling interest of an entity which has been involved in the unauthorized disclosure of United States confidential business information, a proven claim to which is owned by a United States national; or

(4) is a spouse, minor child, or agent of a person excludable under paragraph (1), (2), or (3).

(g) UNITED STATES CONFIDENTIAL BUSINESS INFORMATION DEFINED.—In this section, the term "United

States confidential business information" means any trade secrets or commercial or financial information that is privileged and confidential—

(1) including—

(A) data described in section 304(e)(2) of this Act,

(B) any chemical structure,

(C) any plant design process, technology, or operating method,

(D) any operating requirement, input, or result that identifies any type or quantity of chemicals used, processed, or produced, or

(E) any commercial sale, shipment, or use of a chemical, or

(2) as described in section 552(b)(4) of title 5, United States Code, and that is obtained—

(i) from a United States person; or

(ii) through the United States Government or the conduct of an inspection on United States territory under the Convention.

TITLE II—PENALTIES FOR UNLAWFUL ACTIVITIES SUBJECT TO THE JURISDICTION OF THE UNITED STATES

Subtitle A—Criminal and Civil Penalties

SEC. 201. CRIMINAL AND CIVIL PROVISIONS.

(a) IN GENERAL.—Part I of title 18, United States Code, is amended by inserting after chapter 11A the following new chapter:

"CHAPTER 11B—CHEMICAL WEAPONS

"Sec.

"229. Prohibited activities.

"229A. Penalties.

"229B. Criminal forfeitures; destruction of weapons.

"229C. Individual self-defense devices.

"229D. Injunctions.

"229E. Requests for military assistance to enforce prohibition in certain emergencies.

"229F. Definitions.

"§ 229. Prohibited activities

"(a) UNLAWFUL CONDUCT.—Except as provided in subsection (b), it shall be unlawful for any person knowingly—

"(1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain,

own, possess, or use, or threaten to use, any chemical weapon; or

"(2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1).

"(b) EXEMPTED AGENCIES AND PERSONS.—

"(1) IN GENERAL.—Subsection (a) does not apply to the retention, ownership, possession, transfer, or receipt of a chemical weapon by a department, agency, or other entity of the United States, or by a person described in paragraph (2), pending destruction of the weapon.

"(2) EXEMPTED PERSONS.—A person referred to in paragraph (1) is—

"(A) any person, including a member of the Armed Forces of the United States, who is authorized by law or by an appropriate officer of the United States to retain, own, possess, transfer, or receive the chemical weapon; or

"(B) in an emergency situation, any otherwise nonculpable person if the person is attempting to destroy or seize the weapon.

"(c) JURISDICTION.—Conduct prohibited by subsection (a) is within the jurisdiction of the United States if the prohibited conduct—

"(1) takes place in the United States;

"(2) takes place outside of the United States and is committed by a national of the United States;

"(3) is committed against a national of the United States while the national is outside the United States; or

"(4) is committed against any property that is owned, leased, or used by the United States or by any department or agency of the United States, whether the property is within or outside the United States.

"§ 229A. Penalties

"(a) CRIMINAL PENALTIES.—

"(1) IN GENERAL.—Any person who violates section 229 of this title shall be fined under this title, or imprisoned for any term of years, or both.

"(2) DEATH PENALTY.—Any person who violates section 229 of this title and by whose action the death of another person is the result shall be punished by death or imprisoned for life.

"(b) CIVIL PENALTIES.—

"(1) IN GENERAL.—The Attorney General may bring a civil action in the appropriate United States district court against any person who violates section 229 of this title and, upon proof of such violation by a preponderance of the evidence, such person shall be subject to pay a civil penalty in an amount not to exceed $100,000 for each such violation.

"(2) RELATION TO OTHER PROCEEDINGS.—The imposition of a civil penalty under this subsection does not preclude any other criminal or civil statutory, common law, or administrative remedy, which is

available by law to the United States or any other person.

"(c) REIMBURSEMENT OF COSTS.—The court shall order any person convicted of an offense under subsection (a) to reimburse the United States for any expenses incurred by the United States incident to the seizure, storage, handling, transportation, and destruction or other disposition of any property that was seized in connection with an investigation of the commission of the offense by that person. A person ordered to reimburse the United States for expenses under this subsection shall be jointly and severally liable for such expenses with each other person, if any, who is ordered under this subsection to reimburse the United States for the same expenses.

"§ 229B. Criminal forfeitures; destruction of weapons

"(a) PROPERTY SUBJECT TO CRIMINAL FORFEITURE.—Any person convicted under section 229A(a) shall forfeit to the United States irrespective of any provision of State law—

"(1) any property, real or personal, owned, possessed, or used by a person involved in the offense;

"(2) any property constituting, or derived from, and proceeds the person obtained, directly or indirectly, as the result of such violation; and

"(3) any of the property used in any manner or part, to commit, or to facilitate the commission of, such violation.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant

to section 229A(a), that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by section 229A(a), a defendant who derived profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

"(b) PROCEDURES.—

"(1) GENERAL.—Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed by subsections (b) through (p) of section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), except that any reference under those subsections to—

"(A) 'this subchapter or subchapter II' shall be deemed to be a reference to section 229A(a); and

"(B) 'subsection (a)' shall be deemed to be a reference to subsection (a) of this section.

"(2) TEMPORARY RESTRAINING ORDERS.—

"(A) IN GENERAL.—For the purposes of forfeiture proceedings under this section, a temporary restraining order may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if, in addition to the circumstances described in section 413(e)(2) of the Comprehensive Drug Abuse Prevention and Control Act of

1970 (21 U.S.C. 853(e)(2)), the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and exigent circumstances exist that place the life or health of any person in danger.

"(B) WARRANT OF SEIZURE.—If the court enters a temporary restraining order under this paragraph, it shall also issue a warrant authorizing the seizure of such property.

"(C) APPLICABLE PROCEDURES.—The procedures and time limits applicable to temporary restraining orders under section 413(e)(2) and (3) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853(e)(2) and (3)) shall apply to temporary restraining orders under this paragraph.

"(c) AFFIRMATIVE DEFENSE.—It is an affirmative defense against a forfeiture under subsection (b) that the property—

"(1) is for a purpose not prohibited under the Chemical Weapons Convention; and

"(2) is of a type and quantity that under the circumstances is consistent with that purpose.

"(d) DESTRUCTION OR OTHER DISPOSITION.—The Attorney General shall provide for the destruction or other appropriate disposition of any chemical weapon seized and forfeited pursuant to this section.

"(e) ASSISTANCE.—The Attorney General may request the head of any agency of the United States to assist in the handling, storage, transportation, or destruction of property seized under this section.

"(f) OWNER LIABILITY.—The owner or possessor of any property seized under this section shall be liable to the United States for any expenses incurred incident to the seizure, including any expenses relating to the handling, storage, transportation, and destruction or other disposition of the seized property.

"§ 229C. Individual self-defense devices

"Nothing in this chapter shall be construed to prohibit any individual self-defense device, including those using a pepper spray or chemical mace.

"§ 229D. Injunctions

"The United States may obtain in a civil action an injunction against—

"(1) the conduct prohibited under section 229 or 229C of this title; or

"(2) the preparation or solicitation to engage in conduct prohibited under section 229 or 229D of this title.

"§ 229E. Requests for military assistance to enforce prohibition in certain emergencies

"The Attorney General may request the Secretary of Defense to provide assistance under section 382 of title 10 in support of Department of Justice activities relating to the enforcement of section 229 of this title in an emer-

gency situation involving a chemical weapon. The authority to make such a request may be exercised by another official of the Department of Justice in accordance with section 382(f)(2) of title 10.

"§ 229F. Definitions

"In this chapter:

"(1) CHEMICAL WEAPON.—The term 'chemical weapon' means the following, together or separately:

"(A) A toxic chemical and its precursors, except where intended for a purpose not prohibited under this chapter as long as the type and quantity is consistent with such a purpose.

"(B) A munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals specified in subparagraph (A), which would be released as a result of the employment of such munition or device.

"(C) Any equipment specifically designed for use directly in connection with the employment of munitions or devices specified in subparagraph (B).

"(2) CHEMICAL WEAPONS CONVENTION; CONVENTION.—The terms 'Chemical Weapons Convention' and 'Convention' mean the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993.

"(3) KEY COMPONENT OF A BINARY OR MULTICOMPONENT CHEMICAL SYSTEM.—The term 'key component of a binary or multicomponent chemical system' means the precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system.

"(4) NATIONAL OF THE UNITED STATES.—The term 'national of the United States' has the same meaning given such term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22)).

"(5) PERSON.—The term 'person', except as otherwise provided, means any individual, corporation, partnership, firm, association, trust, estate, public or private institution, any State or any political subdivision thereof, or any political entity within a State, any foreign government or nation or any agency, instrumentality or political subdivision of any such government or nation, or other entity located in the United States.

"(6) PRECURSOR.—

"(A) IN GENERAL.—The term 'precursor' means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. The term includes any key component of a binary or multicomponent chemical system.

"(B) LIST OF PRECURSORS.—Precursors which have been identified for the application of verification measures under Article VI of the Convention

are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

"(7) PURPOSES NOT PROHIBITED BY THIS CHAPTER.—The term 'purposes not prohibited by this chapter' means the following:

"(A) PEACEFUL PURPOSES.—Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity.

"(B) PROTECTIVE PURPOSES.—Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons.

"(C) UNRELATED MILITARY PURPOSES.—Any military purpose of the United States that is not connected with the use of a chemical weapon or that is not dependent on the use of the toxic or poisonous properties of the chemical weapon to cause death or other harm.

"(D) LAW ENFORCEMENT PURPOSES.—Any law enforcement purpose, including any domestic riot control purpose and including imposition of capital punishment.

"(8) TOXIC CHEMICAL.—

"(A) IN GENERAL.—The term 'toxic chemical' means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of

production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

"(B) LIST OF TOXIC CHEMICALS.—Toxic chemicals which have been identified for the application of verification measures under Article VI of the Convention are listed in schedules contained in the Annex on Chemicals of the Chemical Weapons Convention.

"(9) UNITED STATES.—The term 'United States' means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States and includes all places under the jurisdiction or control of the United States, including—

"(A) any of the places within the provisions of paragraph (41) of section 40102 of title 49, United States Code;

"(B) any civil aircraft of the United States or public aircraft, as such terms are defined in paragraphs (17) and (37), respectively, of section 40102 of title 49, United States Code; and

"(C) any vessel of the United States, as such term is defined in section 3(b) of the Maritime Drug Enforcement Act, as amended (46 U.S.C., App. sec. 1903(b)).".

(b) CONFORMING AMENDMENTS.—

(1) WEAPONS OF MASS DESTRUCTION.—Section 2332a of title 18, United States Code, is amended—

(A) by striking "§ 2332a. Use of weapons of mass destruction" and inserting "§ 2332a. Use of certain weapons of mass destruction";

(B) in subsection (a), by inserting "(other than a chemical weapon as that term is defined in section 229F)" after "weapon of mass destruction"; and

(C) in subsection (b), by inserting "(other than a chemical weapon (as that term is defined in section 229F))" after "weapon of mass destructtion".

(2) TABLE OF CHAPTERS.—The table of chapters for part I of title 18, United States Code, is amended by inserting after the item for chapter 11A the following new item:

"113. Chemical Weapons.....229".

(c) REPEALS.—The following provisions of law are repealed:

(1) Section 2332c of title 18, United States Code, relating to chemical weapons.

(2) In the table of sections for chapter 113B of title 18, United States Code, the item relating to section 2332c.

Subtitle B—Revocations of Export Privileges

SEC. 211. REVOCATIONS OF EXPORT PRIVILEGES.

If the President determines, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, that any person within the

United States, or any national of the United States located outside the United States, has committed any violation of section 229 of title 18, United States Code, the President may issue an order for the suspension or revocation of the authority of the person to export from the United States any goods or technology (as such terms are defined in section 16 of the Export Administration Act of 1979 (50 U.S.C. App. 2415)).

TITLE III—INSPECTIONS

SEC. 301. DEFINITIONS IN THE TITLE. [22 U.S.C. 6721]

(a) IN GENERAL.—In this title, the terms "challenge inspection", "plant site", "plant", "facility agreement", "inspection team", and "requesting state party" have the meanings given those terms in Part I of the Annex on Implementation and Verification of the Chemical Weapons Convention. The term "routine inspection" means an inspection, other than an "initial inspection", undertaken pursuant to Article VI of the Convention.

(b) DEFINITION OF JUDGE OF THE UNITED STATES.—In this title, the term "judge of the United States" means a judge or magistrate judge of a district court of the United States.

SEC. 302. FACILITY AGREEMENTS. [22 U.S.C. 6722]

(a) AUTHORIZATION OF INSPECTIONS.—Inspections by the Technical Secretariat of plants, plant sites, or other facilities or locations for which the United States has a facility agreement with the Organization shall be conducted in accordance with the facility agreement. Any such facility agreement may not in any way limit the right

of the owner or operator of the facility to withhold consent to an inspection request.

(b) TYPES OF FACILITY AGREEMENTS.—

(1) SCHEDULE TWO FACILITIES.—The United States National Authority shall ensure that facility agreements for plants, plant sites, or other facilities or locations that are subject to inspection pursuant to paragraph 4 of Article VI of the Convention are concluded unless the owner, operator, occupant, or agent in charge of the facility and the Technical Secretariat agree that such an agreement is not necessary.

(2) SCHEDULE THREE FACILITIES.—The United States National Authority shall ensure that facility agreements are concluded for plants, plant sites, or other facilities or locations that are subject to inspection pursuant to paragraph 5 or 6 of Article VI of the Convention if so requested by the owner, operator, occupant, or agent in charge of the facility.

(c) NOTIFICATION REQUIREMENTS.—The United States National Authority shall ensure that the owner, operator, occupant, or agent in charge of a facility prior to the development of the agreement relating to that facility is notified and, if the person notified so requests, the person may participate in the preparations for the negotiation of such an agreement. To the maximum extent practicable consistent with the Convention, the owner and the operator, occupant or agent in charge of a facility may observe negotiations of the agreement between the United States and the Organization concerning that facility.

(d) CONTENT OF FACILITY AGREEMENTS.—Facility agreements shall—

(1) identify the areas, equipment, computers, records, data, and samples subject to inspection;

(2) describe the procedures for providing notice of an inspection to the owner, occupant, operator, or agent in charge of a facility;

(3) describe the timeframes for inspections; and

(4) detail the areas, equipment, computers, records, data, and samples that are not subject to inspection.

SEC. 303. AUTHORITY TO CONDUCT INSPECTIONS. [22 U.S.C. 6723]

(a) PROHIBITION.—No inspection of a plant, plant site, or other facility or location in the United States shall take place under the Convention without the authorization of the United States National Authority in accordance with the requirements of this title.

(b) AUTHORITY.—

(1) TECHNICAL SECRETARIAT INSPECTION TEAMS.—Any duly designated member of an inspection team of the Technical Secretariat may inspect any plant, plant site, or other facility or location in the United States subject to inspection pursuant to the Convention.

(2) UNITED STATES GOVERNMENT REPRESENTATIVES.—The United States National Authority shall coordinate the designation of employees of the Fed-

eral Government to accompany members of an inspection team of the Technical Secretariat and, in doing so, shall ensure that—

(A) a special agent of the Federal Bureau of Investigation, as designated by the Federal Bureau of Investigation, accompanies each inspection team visit pursuant to paragraph (1);

(B) no employee of the Environmental Protection Agency or the Occupational Safety and Health Administration accompanies any inspection team visit conducted pursuant to paragraph (1); and

(C) the number of duly designated representatives shall be kept to the minimum necessary.

(3) OBJECTIONS TO INDIVIDUALS SERVING AS INSPECTORS.—

(A) IN GENERAL.—In deciding whether to exercise the right of the United States under the Convention to object to an individual serving as an inspector, the President shall give great weight to his reasonable belief that—

(i) such individual is or has been a member of, or a participant in, any group or organization that has engaged in, or attempted or conspired to engage in, or aided or abetted in the commission of, any terrorist act or activity;

(ii) such individual has committed any act or activity which would be a felony under the laws of the United States; or

(iii) the participation of such individual as a member of an inspection team would pose a risk to the national security or economic well-being of the United States.

(B) NOT SUBJECT TO JUDICIAL REVIEW.—Any objection by the President to an individual serving as an inspector, whether made pursuant to this section or otherwise, shall not be reviewable in any court.

SEC. 304. PROCEDURES FOR INSPECTIONS. [22 U.S.C. 6724]

(a) TYPES OF INSPECTIONS.—Each inspection of a plant, plant site, or other facility or location in the United States under the Convention shall be conducted in accordance with this section and section 305, except where other procedures are provided in a facility agreement entered into under section 302.

(b) NOTICE.—

(1) IN GENERAL.—An inspection referred to in subsection (a) may be made only upon issuance of an actual written notice by the United States National Authority to the owner and to the operator, occupant, or agent in charge of the premises to be inspected.

(2) TIME OF NOTIFICATION.—The notice for a routine inspection shall be submitted to the owner and to the operator, occupant, or agent in charge within six hours of receiving the notification of the inspection from the Technical Secretariat or as soon as possible thereafter. Notice for a challenge inspection shall be

provided at any appropriate time determined by the United States National Authority. Notices may be posted prominently at the plant, plant site, or other facility or location if the United States is unable to provide actual written notice to the owner, operator, or agent in charge of the premises.

(3) CONTENT OF NOTICE.—

(A) IN GENERAL.—The notice under paragraph (1) shall include all appropriate information supplied by the Technical Secretariat to the United States National Authority concerning—

(i) the type of inspection;

(ii) the basis for the selection of the plant, plant site, or other facility or location for the type of inspection sought;

(iii) the time and date that the inspection will begin and the period covered by the inspection; and

(iv) the names and titles of the inspectors.

(B) SPECIAL RULE FOR CHALLENGE INSPECTIONS.—In the case of a challenge inspection pursuant to Article IX of the Convention, the notice shall also include all appropriate evidence or reasons provided by the requesting state party to the Convention for seeking the inspection.

(4) SEPARATE NOTICES REQUIRED.—A separate notice shall be provided for each inspection, except that a notice shall not be required for each

entry made during the period covered by the inspection.

(c) CREDENTIALS.—The head of the inspection team of the Technical Secretariat and the accompanying employees of the Federal government shall display appropriate identifying credentials to the owner, operator, occupant, or agent in charge of the premises before the inspection is commenced.

(d) TIMEFRAME FOR INSPECTIONS.—Consistent with the provisions of the Convention, each inspection shall be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner.

(e) SCOPE.—

(1) IN GENERAL.—Except as provided in a warrant issued under section 305 or a facility agreement entered into under section 302, an inspection conducted under this title may extend to all things within the premises inspected (including records, files, papers, processes, controls, structures and vehicles) related to whether the requirements of the Convention applicable to such premises have been complied with.

(2) EXCEPTION.—Unless required by the Convention, no inspection under this title shall extend to—

(A) financial data;

(B) sales and marketing data (other than shipment data);

(C) pricing data;

(D) personnel data;

(E) research data;

(F) patent data;

(G) data maintained for compliance with environmental or occupational health and safety regulations; or

(H) personnel and vehicles entering and personnel and personal passenger vehicles exiting the facility.

(f) SAMPLING AND SAFETY.—

(1) IN GENERAL.—The Director of the United States National Authority is authorized to require the provision of samples to a member of the inspection team of the Technical Secretariat in accordance with the provisions of the Convention. The owner or the operator, occupant or agent in charge of the premises to be inspected shall determine whether the sample shall be taken by representatives of the premises or the inspection team or other individuals present. No sample collected in the United States pursuant to an inspection permitted by this Act may be transferred for analysis to any laboratory outside the territory of the United States.

(2) COMPLIANCE WITH REGULATIONS.—In carrying out their activities, members of the inspection team of the Technical Secretariat and representatives of agencies or departments accompanying the inspection team shall observe safety regulations established at the premises to be inspected, including those for

protection of controlled environments within a facility and for personal safety.

(g) COORDINATION.—The appropriate representatives of the United States, as designated, if present, shall assist the owner and the operator, occupant or agent in charge of the premises to be inspected in interacting with the members of the inspection team of the Technical Secretariat.

SEC. 305. WARRANTS. [22 U.S.C. 6725]

(a) IN GENERAL.—The United States Government shall seek the consent of the owner or the operator, occupant, or agent in charge of the premises to be inspected prior to any inspection referred to in section 304(a). If consent is obtained, a warrant is not required for the inspection. The owner or the operator, occupant, or agent in charge of the premises to be inspected may withhold consent for any reason or no reason. After providing notification pursuant to subsection (b), the United States Government may seek a search warrant from a United States magistrate judge. Proceedings regarding the issuance of a search warrant shall be conducted ex parte, unless otherwise requested by the United States Government.

(b) ROUTINE INSPECTIONS.—

(1) OBTAINING ADMINISTRATIVE SEARCH WARRANTS.—For any routine inspection conducted on the territory of the United States pursuant to Article VI of the Convention, where consent has been withheld, the United States Government shall first obtain an administrative search warrant from a judge of the

United States. The United States Government shall provide to the judge of the United States all appropriate information supplied by the Technical Secretariat to the United States National Authority regarding the basis for the selection of the plant site, plant, or other facility or location for the type of inspection sought. The United States Government shall also provide any other appropriate information available to it relating to the reasonableness of the selection of the plant, plant site, or other facility or location for the inspection.

(2) CONTENT OF AFFIDAVITS FOR ADMINISTRATIVE SEARCH WARRANTS.—The judge of the United States shall promptly issue a warrant authorizing the requested inspection upon an affidavit submitted by the United States Government showing that—

(A) the Chemical Weapons Convention is in force for the United States;

(B) the plant site, plant, or other facility or location sought to be inspected is required to report data under title IV of this Act and is subject to routine inspection under the Convention;

(C) the purpose of the inspection is—

(i) in the case of any facility owned or operated by a non-Government entity related to Schedule 1 chemical agents, to verify that the facility is not used to produce any Schedule 1 chemical agent except for declared chemicals; quantities of Schedule 1 chemicals produced, processed, or consumed are correctly declared

and consistent with needs for the declared purpose; and Schedule 1 chemicals are not diverted or used for other purposes;

(ii) in the case of any facility related to Schedule 2 chemical agents, to verify that activities are in accordance with obligations under the Convention and consistent with the information provided in data declarations; and

(iii) in the case of any facility related to Schedule 3 chemical agents and any other chemical production facility, to verify that the activities of the facility are consistent with the information provided in data declarations;

(D) the items, documents, and areas to be searched and seized;

(E) in the case of a facility related to Schedule 2 or Schedule 3 chemical agents or unscheduled discrete organic chemicals, the plant site has not been subject to more than 1 routine inspection in the current calendar year, and, in the case of facilities related to Schedule 3 chemical agents or unscheduled discrete organic chemicals, the inspection will not cause the number of routine inspections in the United States to exceed 20 in a calendar year;

(F) the selection of the site was made in accordance with procedures established under the Convention and, in particular—

(i) in the case of any facility owned or operated by a non-Government entity related to Schedule 1 chemical agents, the intensity, duration, timing, and mode of the requested inspection is based on the risk to the object and purpose of the Convention by the quantities of chemical produced, the characteristics of the facility and the nature of activities carried out at the facility, and the requested inspection, when considered with previous such inspections of the facility undertaken in the current calendar year, shall not exceed the number reasonably required based on the risk to the object and purpose of the Convention as described above;

(ii) in the case of any facility related to Schedule 2 chemical agents, the Technical Secretariat gave due consideration to the risk to the object and purpose of the Convention posed by the relevant chemical, the characteristics of the plant site and the nature of activities carried out there, taking into account the respective facility agreement as well as the results of the initial inspections and subsequent inspections; and

(iii) in the case of any facility related to Schedule 3 chemical agents or unscheduled discrete organic chemicals, the facility was selected randomly by the Technical Secretariat using appropriate mechanisms, such as specifically designed computer software, on the basis

of two weighting factors: (I) equitable geographical distribution of inspections; and (II) the information on the declared sites available to the Technical Secretariat, related to the relevant chemical, the characteristics of the plant site, and the nature of activities carried out there;

(G) the earliest commencement and latest closing dates and times of the inspection; and

(H) the duration of inspection will not exceed time limits specified in the Convention unless agreed by the owner, operator, or agent in charge of the plant.

(3) CONTENT OF WARRANTS.—A warrant issued under paragraph (2) shall specify the same matters required of an affidavit under that paragraph. In addition to the requirements for a warrant issued under this paragraph, each warrant shall contain, if known, the identities of the representatives of the Technical Secretariat conducting the inspection and the observers of the inspection and, if applicable, the identities of the representatives of agencies or departments of the United States accompanying those representatives.

(4) CHALLENGE INSPECTIONS.—

(A) CRIMINAL SEARCH WARRANT.—For any challenge inspection conducted on the territory of the United States pursuant to Article IX of the Chemical Weapons Convention, where consent has been withheld, the United States Government

shall first obtain from a judge of the United States a criminal search warrant based upon probable cause, supported by oath or affirmation, and describing with particularity the place to be searched and the person or things to be seized.

(B) INFORMATION PROVIDED.—The United States Government shall provide to the judge of the United States—

(i) all appropriate information supplied by the Technical Secretariat to the United States National Authority regarding the basis for the selection of the plant site, plant, or other facility or location for the type of inspection sought;

(ii) any other appropriate information relating to the reasonableness of the selection of the plant, plant site, or other facility or location for the inspection;

(iii) information concerning—

(I) the duration and scope of the inspection;

(II) areas to be inspected;

(III) records and data to be reviewed; and

(IV) samples to be taken;

(iv) appropriate evidence or reasons provided by the requesting state party for the inspection;

(v) any other evidence showing probable cause to believe that a violation of this Act has occurred or is occurring; and

(vi) the identities of the representatives of the Technical Secretariat on the inspection team and the Federal Government employees accompanying the inspection team.

(C) CONTENT OF WARRANT.—The warrant shall specify—

(i) the type of inspection authorized;

(ii) the purpose of the inspection;

(iii) the type of plant site, plant, or other facility or location to be inspected;

(iv) the areas of the plant site, plant, or other facility or location to be inspected;

(v) the items, documents, data, equipment, and computers that may be inspected or seized;

(vi) samples that may be taken;

(vii) the earliest commencement and latest concluding dates and times of the inspection; and

(viii) the identities of the representatives of the Technical Secretariat on the inspection teams and the Federal Government employees accompanying the inspection team.

SEC. 306. PROHIBITED ACTS RELATING TO INSPECTIONS. [22 U.S.C. 6726]

It shall be unlawful for any person willfully to fail or refuse to permit entry or inspection, or to disrupt, delay, or otherwise impede an inspection, authorized by this Act.

SEC. 307. NATIONAL SECURITY EXCEPTION. [22 U.S.C. 6727]

Consistent with the objective of eliminating chemical weapons, the President may deny a request to inspect any facility in the United States in cases where the President determines that the inspection may pose a threat to the national security interests of the United States.

SEC. 308. PROTECTION OF CONSTITUTIONAL RIGHTS OF CONTRACTORS. [41 U.S.C. 2309]

(a) The Office of Federal Procurement Policy Act (41 U.S.C. 403 et seq.) is amended by adding at the end the following:

"SEC. 39. PROTECTION OF CONSTITUTIONAL RIGHTS OF CONTRACTORS.

"(a) PROHIBITION.—A contractor may not be required, as a condition for entering into a contract with the Federal Government, to waive any right under the Constitution for any purpose related to Chemical Weapons Convention Implementation Act of 1997 or the Chemical Weapons Convention (as defined in section 3 of such Act.)

"(b) CONSTRUCTION.—Nothing in subsection (a) shall be construed to prohibit an executive agency from including in a contract a clause that requires the contractor

to permit inspections for the purpose of ensuring that the contractor is performing the contract in accordance with the provisions of the contract.".

(b) The table of contents in section 1(b) of such Act is amended by adding at the end the following:

"Sec. 39. **Protection of constitutional rights of contractors.**"

SEC. 309. ANNUAL REPORT ON INSPECTIONS. [22 U.S.C. 6728]

(a) IN GENERAL.—Not later than one year after the date of enactment of this Act, and annually thereafter, the President shall submit a report in classified and unclassified form to the appropriate congressional committees on inspections made under the Convention during the preceding year.

(b) CONTENT OF REPORTS.—Each report shall contain the following information for the reporting period:

(1) The name of each company or entity subject to the jurisdiction of the United States reporting data pursuant to title IV of this Act.

(2) The number of inspections under the Convention conducted on the territory of the United States.

(3) The number and identity of inspectors conducting any inspection described in paragraph (2) and the number of inspectors barred from inspection by the United States.

(4) The cost to the United States for each inspection described in paragraph (2).

(5) The total costs borne by United States business firms in the course of inspections described in paragraph (2).

(6) A description of the circumstances surrounding inspections described in paragraph (2), including instances of possible industrial espionage and misconduct of inspectors.

(7) The identity of parties claiming loss of trade secrets, the circumstances surrounding those losses, and the efforts taken by the United States Government to redress those losses.

(8) A description of instances where inspections under the Convention outside the United States have been disrupted or delayed.

(c) DEFINITION.—The term "appropriate congressional committees" means the Committee on the Judiciary, the Committee on Foreign Relations, and the Select Committee on Intelligence of the Senate and the Committee on the Judiciary, the Committee on International Relations, and the Permanent Select Committee on Intelligence of the House of Representatives.

SEC. 310. UNITED STATES ASSISTANCE IN INSPECTIONS AT PRIVATE FACILITIES. [22 U.S.C. 6729]

(a) ASSISTANCE IN PREPARATION FOR INSPECTIONS.—At the request of an owner of a facility not owned or operated by the United States Government, or contracted for use by or for the United States Government,

the Secretary of Defense may assist the facility to prepare the facility for possible inspections pursuant to the Convention.

(b) REIMBURSEMENT REQUIREMENT.—

(1) IN GENERAL.—Except as provided in paragraph (2), the owner of a facility provided assistance under subsection (a) shall reimburse the Secretary for the costs incurred by the Secretary in providing the assistance.

(2) EXCEPTION.—In the case of assistance provided under subsection (a) to a facility owned by a person described in subsection (c), the United States National Authority shall reimburse the Secretary for the costs incurred by the Secretary in providing the assistance.

(c) OWNERS COVERED BY UNITED STATES NATIONAL AUTHORITY REIMBURSEMENTS.—Subsection (b)(2) applies in the case of assistance provided to the following:

(1) SMALL BUSINESS CONCERNS.—A small business concern as defined in section 3 of the Small Business Act.

(2) DOMESTIC PRODUCERS OF SCHEDULE 3 OR UNSCHEDULED DISCRETE ORGANIC CHEMICALS.—Any person located in the United States that—

(A) does not possess, produce, process, consume, import, or export any Schedule 1 or Schedule 2 chemical; and

(B) in the calendar year preceding the year in which the assistance is to be provided, produced—

(i) more than 30 metric tons of Schedule 3 or unscheduled discrete organic chemicals that contain phosphorous, sulfur, or fluorine; or

(ii) more than 200 metric tons of unscheduled discrete organic chemicals.

TITLE IV—REPORTS

SEC. 401. REPORTS REQUIRED BY THE UNITED STATES NATIONAL AUTHORITY. [22 U.S.C. 6741]

(a) REGULATIONS ON RECORDKEEPING.—

(1) REQUIREMENTS.—The United States National Authority shall ensure that regulations are prescribed that require each person located in the United States who produces, processes, consumes, exports, or imports, or proposes to produce, process, consume, export, or import, a chemical substance that is subject to the Convention to—

(A) maintain and permit access to records related to that production, processing, consumption, export, or import of such substance; and

(B) submit to the Director of the United States National Authority such reports as the United States National Authority may reasonably require to provide to the Organization, pursuant to subparagraph 1(a) of the Annex on Confidentiality of the Convention, the minimum amount of information and data necessary for the timely and effi-

cient conduct by the Organization of its responsibilities under the Convention.

(2) RULEMAKING.—The Director of the United States National Authority shall ensure that regulations pursuant to this section are prescribed expeditiously.

(b) COORDINATION.—

(1) AVOIDANCE OF DUPLICATION.—To the extent feasible, the United States Government shall not require the submission of any report that is unnecessary or duplicative of any report required by or under any other law. The head of each Federal agency shall coordinate the actions of that agency with the heads of the other Federal agencies in order to avoid the imposition of duplicative reporting requirements under this Act or any other law.

(2) DEFINITION.—As used in paragraph (1), the term "Federal agency" has the meaning given the term "agency" in section 551(1) of title 5, United States Code.

SEC. 402. PROHIBITION RELATING TO LOW CONCENTRATIONS OF SCHEDULE 2 AND 3 CHEMICALS. [22 U.S.C. 6742]

(a) PROHIBITION.—Notwithstanding any other provision of this Act, no person located in the United States shall be required to report on, or to submit to, any routine inspection conducted for the purpose of verifying the production, possession, consumption, exportation, importation, or proposed production, possession, consump-

tion, exportation, or importation of any substance that contains less than—

(1) 10 percent concentration of a Schedule 2 chemical; or

(2) 80 percent concentration of a Schedule 3 chemical.

(b) STANDARD FOR MEASUREMENT OF CONCENTRATION.—The percent concentration of a chemical in a substance shall be measured on the basis of volume or total weight, which measurement yields the lesser percent.

SEC. 403. PROHIBITION RELATING TO UNSCHEDULED DISCRETE ORGANIC CHEMICALS AND COINCIDENTAL BYPRODUCTS IN WASTE STREAMS. [22 U.S.C. 6743]

(a) PROHIBITION.—Notwithstanding any other provision of this Act, no person located in the United States shall be required to report on, or to submit to, any routine inspection conducted for the purpose of verifying the production, possession, consumption, exportation, importation, or proposed production, possession, consumption, exportation, or importation of any substance that is—

(1) an unscheduled discrete organic chemical; and

(2) a coincidental byproduct of a manufacturing or production process that is not isolated or captured for use or sale during the process and is routed to, or escapes, from the waste stream of a stack, incinerator,

or wastewater treatment system or any other waste stream.

SEC. 404. CONFIDENTIALITY OF INFORMATION. [22 U.S.C. 6744]

(a) FREEDOM OF INFORMATION ACT EXEMPTION FOR CERTAIN CONVENTION INFORMATION.—Except as provided in subsection (b) or (c), any confidential business information, as defined in section 103(g), reported to, or otherwise acquired by, the United States Government under this Act or under the Convention shall not be disclosed under section 552(a) of title 5, United States Code.

(b) EXCEPTIONS.—

(1) INFORMATION FOR THE TECHNICAL SECRETARIAT.—Information shall be disclosed or otherwise provided to the Technical Secretariat or other states parties to the Chemical Weapons Convention in accordance with the Convention, in particular, the provisions of the Annex on the Protection of Confidential Information.

(2) INFORMATION FOR CONGRESS.—Information shall be made available to any committee or subcommittee of Congress with appropriate jurisdiction upon the written request of the chairman or ranking minority member of such committee or subcommittee, except that no such committee or subcommittee, and no member and no staff member of such committee or subcommittee, shall disclose such information or material except as otherwise required or authorized by law.

(3) INFORMATION FOR ENFORCEMENT ACTIONS.—Information shall be disclosed to other Federal agencies for enforcement of this Act or any other law, and shall be disclosed or otherwise provided when relevant in any proceeding under this Act or any other law, except that disclosure or provision in such a proceeding shall be made in such manner as to preserve confidentiality to the extent practicable without impairing the proceeding.

(c) INFORMATION DISCLOSED IN THE NATIONAL INTEREST.—

(1) AUTHORITY.—The United States Government shall disclose any information reported to, or otherwise required by the United States Government under this Act or the Convention, including categories of such information, that it determines is in the national interest to disclose and may specify the form in which such information is to be disclosed.

(2) NOTICE OF DISCLOSURE.—

(A) REQUIREMENT.—If any Department or agency of the United States Government proposes pursuant to paragraph (1) to publish or disclose or otherwise provide information exempt from disclosure under subsection (a), the United States National Authority shall, unless contrary to national security or law enforcement needs, provide notice of intent to disclose the information—

(i) to the person that submitted such information; and

(ii) in the case of information about a person received from another source, to the person to whom that information pertains.

The information may not be disclosed until the expiration of 30 days after notice under this paragraph has been provided.

(B) PROCEEDINGS ON OBJECTIONS.—In the event that the person to which the information pertains objects to the disclosure, the agency shall promptly review the grounds for each objection of the person and shall afford the objecting person a hearing for the purpose of presenting the objections to the disclosure. Not later than 10 days before the scheduled or rescheduled date for the disclosure, the United States National Authority shall notify such person regarding whether such disclosure will occur notwithstanding the objections.

(d) CRIMINAL PENALTY FOR WRONGFUL DISCLOSURE.—Any officer or employee of the United States, and any former officer or employee of the United States, who by reason of such employment or official position has obtained possession of, or has access to, information the disclosure or other provision of which is prohibited by subsection (a), and who, knowing that disclosure or provision of such information is prohibited by such subsection, willfully discloses or otherwise provides the information in any manner to any person (including any person located outside the territory of the United States) not authorized to receive it, shall be fined under title 18,

United States Code, or imprisoned for not more than five years, or both.

(e) CRIMINAL FORFEITURE.—The property of any person who violates subsection (d) shall be subject to forfeiture to the United States in the same manner and to the same extent as is provided in section 229C of title 18, United States Code, as added by this Act.

(f) INTERNATIONAL INSPECTORS.—The provisions of this section shall also apply to employees of the Technical Secretariat.

SEC. 405. RECORDKEEPING VIOLATIONS. [22 U.S.C. 6745]

It shall be unlawful for any person willfully to fail or refuse—

(1) to establish or maintain any record required by this Act or any regulation prescribed under this Act;

(2) to submit any report, notice, or other information to the United States Government in accordance with this Act or any regulation prescribed under this Act; or

(3) to permit access to or copying of any record that is exempt from disclosure under this Act or any regulation prescribed under this Act.

TITLE V—ENFORCEMENT

SEC. 501. PENALTIES. [22 U.S.C. 6761]

(a) CIVIL.—

(1) PENALTY AMOUNTS.—

(A) PROHIBITED ACTS RELATING TO INSPECTIONS.—Any person that is determined, in accordance with paragraph (2), to have violated section 306 of this Act shall be required by order to pay a civil penalty in an amount not to exceed $25,000 for each such violation. For purposes of this paragraph, each day such a violation of section 306 continues shall constitute a separate violation of that section.

(B) RECORDKEEPING VIOLATIONS.—Any person that is determined, in accordance with paragraph (2), to have violated section 405 of this Act shall be required by order to pay a civil penalty in an amount not to exceed $5,000 for each such violation.

(2) HEARING.—

(A) IN GENERAL.—Before imposing an order described in paragraph (1) against a person under this subsection for a violation of section 306 or 405, the Secretary of State shall provide the person or entity with notice and, upon request made within 15 days of the date of the notice, a hearing respecting the violation.

(B) CONDUCT OF HEARING.—Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of title 5, United States Code. If no hearing is so requested, the Secretary of State's imposition of the order shall constitute a final and unappealable order.

(C) ISSUANCE OF ORDERS.—If the administrative law judge determines, upon the preponderance of the evidence received, that a person or entity named in the complaint has violated section 306 or 405, the administrative law judge shall state his findings of fact and issue and cause to be served on such person or entity an order described in paragraph (1).

(D) FACTORS FOR DETERMINATION OF PENALTY AMOUNTS.—In determining the amount of any civil penalty, the administrative law judge shall take into account the nature, circumstances, extent, and gravity of the violation or violations and, with respect to the violator, the ability to pay, effect on ability to continue to do business, any history of prior such violations, the degree of culpability, the existence of an internal compliance program, and such other matters as justice may require.

(3) ADMINISTRATIVE APPELLATE REVIEW.—The decision and order of an administrative law judge shall become the final agency decision and order of the head

of the United States National Authority unless, within 30 days, the head of the United States National Authority modifies or vacates the decision and order, with or without conditions, in which case the decision and order of the head of the United States National Authority shall become a final order under this subsection.

(4) OFFSETS.—The amount of the civil penalty under a final order of the United States National Authority may be deducted from any sums owed by the United States to the person.

(5) JUDICIAL REVIEW.—A person adversely affected by a final order respecting an assessment may, within 30 days after the date the final order is issued, file a petition in the Court of Appeals for the District of Columbia Circuit or for any other circuit in which the person resides or transacts business.

(6) ENFORCEMENT OF ORDERS.—If a person fails to comply with a final order issued under this subsection against the person or entity—

(A) after the order making the assessment has become a final order and if such person does not file a petition for judicial review of the order in accordance with paragraph (5), or

(B) after a court in an action brought under paragraph (5) has entered a final judgment in favor of the United States National Authority,

the Secretary of State shall file a suit to seek compliance with the order in any appropriate district court of the

United States, plus interest at currently prevailing rates calculated from the date of expiration of the 30-day period referred to in paragraph (5) or the date of such final judgment, as the case may be. In any such suit, the validity and appropriateness of the final order shall not be subject to review.

(b) CRIMINAL.—Any person who knowingly violates any provision of section 306 or 405 of this Act, shall, in addition to or in lieu of any civil penalty which may be imposed under subsection (a) for such violation, be fined under title 18, United States Code, imprisoned for not more than one year, or both.

SEC. 502. SPECIFIC ENFORCEMENT. [22 U.S.C. 6762]

(a) JURISDICTION.—The district courts of the United States shall have jurisdiction over civil actions to—

(1) restrain any violation of section 306 or 405 of this Act; and

(2) compel the taking of any action required by or under this Act or the Convention.

(b) CIVIL ACTIONS.—

(1) IN GENERAL.—A civil action described in subsection (a) may be brought—

(A) in the case of a civil action described in subsection (a)(1), in the United States district court for the judicial district in which any act, omission, or transaction constituting a violation of

section 306 or 405 occurred or in which the defendant is found or transacts business; or

(B) in the case of a civil action described in subsection (a)(2), in the United States district court for the judicial district in which the defendant is found or transacts business.

(2) SERVICE OF PROCESS.—In any such civil action process may be served on a defendant wherever the defendant may reside or may be found, whether the defendant resides or may be found within the United States or elsewhere.

SEC. 503. EXPEDITED JUDICIAL REVIEW. [22 U.S.C. 6763]

(a) CIVIL ACTION.—Any person or entity subject to a search under this Act may file a civil action challenging the constitutionality of any provision of this Act. Notwithstanding any other provision of law, during the full calendar year of, and the two full calendar years following, the enactment of this Act, the district court shall accord such a case a priority in its disposition ahead of all other civil actions except for actions challenging the legality and conditions of confinement.

(b) EN BANC REVIEW.—Notwithstanding any other provision of law, during the full calendar year of, and the two full calendar years following, the enactment of this Act, any appeal from a final order entered by a district court in an action brought under subsection (a) shall be heard promptly by the full Court of Appeals sitting en banc.

TITLE VI—MISCELLANEOUS PROVISIONS

SEC. 601. REPEAL.

Section 808 of the Department of Defense Appropriation Authorization Act, 1978 (50 U.S.C. 1520; relating to the use of human subjects for the testing of chemical or biological agents) is repealed.

SEC. 602. PROHIBITION. [22 U.S.C. 6771]

(a) IN GENERAL.—Neither the Secretary of Defense nor any other officer or employee of the United States may, directly or by contract—

(1) conduct any test or experiment involving the use of any chemical or biological agent on a civilian population; or

(2) use human subjects for the testing of chemical or biological agents.

(b) CONSTRUCTION.—Nothing in subsection (a) may be construed to prohibit actions carried out for purposes not prohibited by this Act (as defined in section 3(8)).

(c) BIOLOGICAL AGENT DEFINED.—In this section, the term "biological agent" means any micro-organism (including bacteria, viruses, fungi, rickettsiae or protozoa), pathogen, or infectious substance, or any naturally occurring, bio-engineered or synthesized component of any such micro-organism, pathogen, or infectious substance, whatever its origin or method of production, capable of causing—

(1) death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism;

(2) deterioration of food, water, equipment, supplies, or materials of any kind; or

(3) deleterious alteration of the environment.

SEC. 603. BANKRUPTCY ACTIONS.

Section 362(b) of title 11, United States Code, is amended—

(1) by striking paragraphs (4) and (5); and

(2) by inserting after paragraph (3) the following:

"(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit or any organization exercising authority under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature on January 13, 1993, to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power;".

REPLY BRIEF

No. 12-158

In the
Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF

The government's strained efforts to defend its prosecutorial overreach confirm that neither the Constitution nor the statute permits it. The government's lead argument is the Commerce Clause defense it wisely and expressly abandoned below. The Chemical Weapons Convention Implementation Act, as its very name proclaims, was enacted to implement the Chemical Weapons Convention, not to regulate commerce in chemicals. Unsurprisingly, then, the government's Commerce Clause rationale is a complete misfit. The absence of a commerce-related jurisdictional element and the statute's focus on criminal uses of chemicals without regard to their commercial status defeat the government's desperate and belated effort to fit a square peg into a round hole. And its attempt to analogize this situation to its need to reach fungible home-grown marijuana is absurd; Congress is not trying to eliminate vinegar or the countless other household chemicals that can be used for criminal purposes from interstate commerce.

The government's felt-need to resurrect a commerce power argument only underscores the difficulties with its limitless conception of Congress' power to implement treaties. The government never defends its broad conception of section 229 as necessary to implement the Convention. Nor could it. The Convention expressly allows signatories to implement it consistent with their varying constitutional systems, and no one—not even the government—thinks the United States' treaty compliance depends on petitioner's prosecution, let alone her prosecution by federal, rather than state,

officials. Instead, the government contends that simply because section 229 is designed to implement a valid treaty, it is therefore, *ipso facto*, constitutional. That proposition is every bit as extraordinary as it sounds. It ignores the fundamental distinction between self-executing and non-self-executing treaties. But far more troublingly, it ignores the Framers' deliberate decision to withhold from the federal government the kind of police power necessary to reach every malicious use of chemicals nationwide. The ratification of a valid non-self-executing treaty cannot change that bedrock constitutional principle. If section 229 really does reach petitioner's conduct, it is unconstitutional.

This Court need not reach that conclusion, however, because section 229 can be interpreted to avoid both the grave constitutional difficulties and the troubling consequences of the government's limitless conception of its treaty-implementing powers. Congress enacted section 229 to implement the Nation's obligation to prohibit individuals from undertaking activities the Convention prohibits signatory states from undertaking. Construed to apply only to the kind of warlike activity in which a nation-state could engage, the statute discharges that obligation while respecting the basic structure of our Constitution. Construed to federalize every malicious use of chemicals nationwide, the statute radically alters the federal-state balance in a manner the Convention does not contemplate, Congress did not intend, and the Constitution does not allow. Section 229 need not and should not be interpreted to reach the use of toxic chemicals to exact revenge on a romantic rival.

ARGUMENT

I. The Government's Commerce Clause Argument Is Waived And Meritless.

The government begins its defense of section 229 with an argument it expressly and wisely abandoned below. Notwithstanding the self-evident purpose of a statute denominated the Chemical Weapons Convention Implementation Act, the government gamely contends that section 229 is simply part of a comprehensive federal regime to regulate commerce in chemicals. That argument is risible. When the government previewed this late-breaking theory during the first argument in this case, it met with skepticism bordering on incredulity. Oral Argument Tr. 31:15-17, *Bond v. United States*, No. 09-1227 (2011) ("You're trying to drive vinegar out of the interstate market? Do the people know you're trying to do this?").

Even the government previously recognized that the Commerce Clause is a nonstarter. The government did not simply fail to "initially invoke" the commerce power. U.S.Br.26. It unambiguously waived and expressly abandoned any Commerce Clause defense of section 229. Waiver is an overused term, often conflated with forfeiture, *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004), but waiver properly describes the government's deliberate litigation choice below. When petitioner invoked *United States v. Lopez*, 514 U.S. 549 (1995), and *United States v. Morrison*, 529 U.S. 598 (2000), in her motion to dismiss to argue that section 229 is not a valid exercise of Congress' commerce power, JA24-28, the government disavowed any contrary argument,

insisting that "Section 229 was not enacted under the interstate commerce authority but under Congress's authority to implement treaties." JA31.

As the government reluctantly acknowledges, this was no mere description of the authority Congress consciously invoked; it was an express abandonment of any reliance on the Commerce Clause in direct response to petitioner's contention that section 229 could not be justified as an exercise of the commerce power. That is why the courts below accurately described the government as having "affirmatively" "[a]bandoned" a Commerce Clause defense. JA101. The government's contention that petitioner bears the burden "'to negative every conceivable basis which might support'" the statute is misplaced. U.S.Br.25. That burden applies to equal protection challenges to legislative classifications; it is not an exemption from ordinary waiver rules. In any event, petitioner shouldered that burden by explaining why section 229 is not valid Commerce Clause legislation; rather than disagree, the government disclaimed any argument otherwise.

The government offers no authority supporting its effort to immunize itself from the consequences of that decision. In fact, this Court routinely subjects the government to the same waiver rules as any other litigant. *See, e.g.*, *United States v. Jones*, 132 S. Ct. 945, 954 (2012). This Court can leave for another day whether the government can defend a statute based on a constitutional power neither invoked nor abandoned below, but in a world where criminal defendants routinely lose their liberty because of their litigation choices, there is absolutely

no justification for allowing the government alone to resurrect arguments it has affirmatively abandoned when its preferred theory proves untenable.

In any event, the government abandoned the Commerce Clause for good reason. This is not a case in which Congress invoked one power even though another readily supports the statute. The Commerce Clause is a complete misfit with section 229. As its name attests, the statute was enacted to implement the Chemical Weapons Convention, not to regulate interstate commerce in chemicals. The government's contrary contention is belied by the statute and foreclosed by precedent.

This Court has "upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature." *Morrison*, 529 U.S. at 613. The use of chemical weapons is "not, in any sense of the phrase, economic activity." *Id.* It is conduct that "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. To be sure, some activities involving chemicals undoubtedly implicate interstate commerce. But section 229 "contains no jurisdictional element which would ensure, through case-by-case inquiry, that the" use in question does. *Id.* That is no oversight—in its effort to implement the Convention, Congress deliberately drafted a statute that reaches all warlike uses of chemical weapons without regard to their nexus to interstate commerce. That statute, which criminalizes noneconomic activity, cannot be defended as

Commerce Clause legislation under *Lopez* and *Morrison*.

Nor does the government advance its argument by insisting that chemicals are articles of commerce subject to "a comprehensive regulatory scheme." U.S.Br.20. Firearms are articles of commerce subject to comprehensive federal regulation as well, but that did not stop this Court from striking down a firearms statute that "neither regulate[d] a commercial activity nor contain[ed] a requirement that the" activity "be connected in any way to interstate commerce." *Lopez*, 514 U.S. at 551.

The stubborn problem for the government is that, in enacting 229, Congress' stated and actual concern was with uses of chemicals that implicate the Convention, not uses of chemicals that substantially affect interstate commerce. If Congress had the latter purpose in mind, it would have enacted a very different statute. For example, while the government attempts to analogize section 229 to provisions of the Toxic Substances Control Act, U.S.Br.22, the latter statute contains exactly the kind of commerce nexus section 229 lacks: It authorizes restrictions only on "*commercial* use" of toxic substances. 15 U.S.C. § 2605(a)(5) (emphasis added). And section 229 looks nothing like criminal statutes that facilitate regulation of interstate commerce. It does not, for example, criminalize failure to properly label or safely transport chemicals traveling in interstate commerce. *Cf., e.g.*, 21 U.S.C. §§ 823(f), 844(a) (establishing registration requirements for dispensing and obtaining controlled substances).

Instead, it criminalizes noneconomic activity without regard to whether it implicates interstate commerce.[1]

The government suggests section 229 is analogous to provisions of the Controlled Substances Act upheld in *Gonzales v. Raich*, 545 U.S. 1 (2005). But *Raich* is wholly inapposite. *Raich* involved an attempt to eradicate a product from interstate commerce, which the Court emphasized "is a rational (and commonly utilized) means of *regulating commerce* in that product." *Id.* at 26 (emphasis added). Precisely because there was no lawful interstate market in marijuana, there were no labeling requirements that would allow federal authorities to determine whether marijuana had traveled in interstate commerce. Given the fungible nature of the regulated product, Congress could reach even home-grown marijuana as part of a rational scheme for regulating "quintessentially economic" activity. *Id.* at 25; *id.* at 19 (excising local conduct would "frustrate the federal interest in eliminating commercial transactions in the interstate market in their entirety").[2]

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[1] The government's argument might fare better if section 229 applied only to the exceptionally dangerous and easily weaponized chemicals subject to stringent trade restrictions under the Convention, *see* Conv., Verification Annex, Part VI, but the government offers no such limiting construction.

[2] The government also invokes a trio of statutes mentioned in *Raich*, including the biological weapons prohibition. But *Raich* cited those statutes as efforts to eradicate prohibited items from interstate commerce, which is clearly not what section 229 seeks to do to the vast array of commercially useful chemicals it implicates. And, as explained, Petr.Br.45 n.2, some of those statutes are also in dire need of limiting constructions lest, for

The situation here is fundamentally different. Congress affirmatively welcomes interstate commerce in chemicals and imposes numerous requirements to regulate that commerce. Section 229 is just not one of them. It is in a different chapter of the code and addresses quintessentially *noneconomic* activities—namely, the use of chemical weapons without regard to any effect on commerce. That class of noneconomic activities cannot be characterized as substantially affecting interstate commerce without "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567.[3]

In short, the government was right to abandon the Commerce Clause below. Its Commerce Clause argument is a complete misfit with the statute Congress actually enacted. It fails not because the government is estopped from invoking sources of congressional authority that did not, in fact, occur to Congress, but because, in the case of section 229, form followed function. Congress enacted a statute that prohibited uses of chemicals that implicated a non-self-executing treaty, without regard to their effect on commerce. That statute cannot be defended as something it is not and never pretended to be.

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instance, malicious spitting with a head cold be equated with deployment of biological weapons.

[3] *Raich*'s distinction between facial and as applied challenges does not help the government. Petitioner has argued that if section 229 is viewed as Commerce Clause legislation, it is invalid both facially and as applied. JA24-28.

II. The Chemical Weapons Convention Does Not Empower Congress To Federalize Petitioner's Conduct.

The government's defense of its broad view of section 229 thus must stand or fall on its remarkable contention that Congress need not abide by the federalist structure of our Constitution when it legislates to implement a valid non-self-executing treaty. Rather than reconcile that startling proposition with the Constitution or precedent, the government principally defends an entirely different one—that federalism principles impose no limits on the power to *make* treaties. While that proposition is highly debatable, it is of little consequence here. This case is not about the scope of the power to *make* treaties; petitioner concedes that the Convention is a valid treaty. This case is about the scope of Congress' power to *implement* treaties, specifically, *non-self-executing* treaties.

That makes the government's detailed discussion of the history of the treaty-making power largely beside the point. U.S.Br.29-33. To be sure, one problem with the Articles of Confederation was the new government's inability to enforce treaties. But the Framers addressed that problem by vesting the President and Senate with power to make self-executing treaties that would operate as "the supreme Law of the Land," U.S. Const. art. VI, not by vesting Congress with plenary power to enact legislation to implement non-self-executing treaties. The government's lengthy diversion into early exercises of the treaty-making power and cases recognizing that self-executing treaties had

preemptive force is therefore of little relevance, as not one of its examples involves federal legislation *implementing* a treaty (let alone a *non-self-executing* treaty). U.S.Br.32-38.

The government nevertheless proceeds on the assumption that if it can establish a plenary treaty-making power, it necessarily follows that Congress has plenary power to implement non-self-executing treaties. But that does not remotely follow. If anything, the government's robust conception of its treaty-making power only underscores the problems with an unchecked treaty-implementing power. If there is nothing to limit the modern imagination concerning the subjects non-self-executing treaties may address, and nothing to limit the measures Congress may enact to implement such treaties, then "all that stands between the remaining essentials of state sovereignty and Congress is the latter's underdeveloped capacity for self-restraint." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting).

Part of the answer is recognizing that the treaty-making power is no more unlimited than any other federal power. *See Reid v. Covert*, 354 U.S. 1, 16-18 (1957) (plurality opinion). But an equally important (and more judicially administrable) part of the answer is recognizing that legislation designed to implement non-self-executing treaties is not immune from the constitutional restraints that govern all other federal legislation. That principle would seem to flow directly from the very nature of non-self-executing treaties. Non-self-executing treaties specifically contemplate subsequent governmental

action to bring them into force. There is simply no good reason—and the government offers none—why such action need not respect our basic constitutional structure.

Indeed, this Court has already established that federal legislation enacted to implement a valid non-self-executing treaty is, like all other federal legislation, subject to basic constitutional constraints. *See, e.g., Reid*, 354 U.S. at 16-18; *Mayor of New Orleans v. United States*, 35 U.S. 662, 736 (1836). The government attempts to minimize these decisions by insisting that they refer only to "the Constitution's express prohibitions." U.S.Br.46. But one need look no further than this Court's earlier opinion in this case for an emphatic rejection of the view that only the Constitution's express prohibitions limit Congress or protect individual rights. The government offers no compelling reason why the Constitution's liberty-protecting structural limitations would not apply equally to legislation enacted to implement a non-self-executing treaty.

The government seems to believe that structural constraints must give way lest the United States negotiate a treaty it could not enforce. But that remains a possibility if the United States negotiates a treaty that cannot be implemented consistently with the First Amendment or the Due Process Clause. And the government's argument ignores the possibility that validly enacted state and local laws will permit the United States to implement a treaty consistently with our basic constitutional structure. For example, a treaty obligation to provide consular notification for arrested foreign nationals does not

imply a congressional power to federalize all crimes or nationalize all police departments. Similarly, if the Convention really required the United States to prohibit all malicious use of chemicals, state criminal prohibitions surely could discharge that obligation. That may make the treaty-implementing function more cumbersome, but the Framers did not elevate federal legislative efficiency above all other values. If they did, they would have created a federal government with plenary powers, rather than a Congress with limited and enumerated powers. To the extent treaties increasingly concern matters traditionally the province of state governments, the need to stop and consider state law before deciding whether federal legislation is wise, necessary, or even constitutional is a welcome check, not a regrettable inconvenience.

More fundamentally, this Court has already rejected the argument that the Constitution's structural protections must yield to ensure compliance with our treaty obligations. In *Medellin v. Texas*, 552 U.S. 491 (2008), the Court expressly recognized that failing to give preemptive effect to a presidential order would put the United States in breach of its obligations under the Vienna Convention on Consular Notification. Even so, the Court did not shy away from enforcing the Constitution's structural protections, which did not force Texas to yield to a presidential directive. *Id.* at 504. Although petitioner has repeatedly emphasized *Medellin*'s incompatibility with the government's unlimited conception of its treaty power, *e.g.*, Petr.Br.32, the government offers no response, citing

Medellin only once to support a principle not in dispute.

In short, it is well established that federal action to implement a non-self-executing treaty must comply with the Constitution. The validity of the treaty does not somehow guarantee the validity of compliance efforts. The government's contrary contention would leave courts with no choice but to take on the unenviable task of determining the validity of non-self-executing treaties, rather than deferring to the political branches on that issue while reviewing treaty-implementing legislation for consistency with our basic constitutional structure. Between those two options, the function better suited to judicial discharge is crystal clear. The constitutionality of treaty-implementing legislation can and should be tested the same way as all other government action. And tested that way, the government's construction of section 229 as reaching every malicious use of chemicals is plainly unconstitutional.

Significantly, not even the government contends that its broad conception of section 229 is necessary to bring the United States into compliance with its treaty obligations. The possibility that petitioner might escape criminal prosecution is not a matter of international concern, let alone one addressed by the Convention. And even if prohibiting malicious use of chemicals in domestic disputes were necessary for compliance, the Convention is explicitly indifferent to whether federal or state laws (such as those prohibiting murder and assault) do the work. Conv. Art. VII(1) (each signatory "shall, in accordance with

its constitutional processes, adopt the necessary measures to implement its obligations"). Any notion that only section 229 prosecutions can discharge our treaty obligations is difficult to square with the reality that the federal government has brought only a handful of such prosecutions, despite countless incidents involving malicious use of chemicals since its enactment. U.S.Br.Opp.27 n.5.

It is equally clear that a federal prohibition on all malicious uses of chemicals would not be "proper" legislation.[1] Rather, it would be antithetical to our basic constitutional structure. Even as the federal government's powers have expanded over the past two centuries, they have never been thought to include the power to impose a general criminal code on the Nation. When the Solicitor General suggested such a power in *Lopez*, Oral Argument Tr. 8-9, *United States v. Lopez*, No. 93-1260 (1994), the fate of that statute was effectively sealed. Congress may prohibit murder on federal enclaves, among the uniformed military, and in other areas of federal concern, but a federal power to criminalize every

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[1] The government attempts to avoid the "proper" analysis by resurrecting its distinction between statutes that exceed Congress' enumerated powers and statutes that "transgress ... structural state-sovereignty limitations." U.S.Br.42 n.7. This Court already rejected that argument. *See Bond v. United States*, 131 S. Ct. 2355, 2366 (2011). As five members of the Court have since reiterated, "the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States but also when it violates the background principle of enumerated (and hence limited) federal power." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2646 (2012) (joint dissent); *accord id.* at 2592 (Roberts, C.J.).

murder and assault involving chemicals has never been contemplated. Such legislation is not proper because it fails to respect the most fundamental tenets of our constitutional structure. The ratification of a valid non-self-executing treaty does not change that basic truth.[5]

The consequences of recognizing as much are hardly dire. Very few treaties require legislation Congress cannot enact, for Congress possesses many

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[5] This result follows whether this Court conceives of petitioner's challenge as as-applied or facial. In keeping with the Court's frequent reminders that facial challenges are disfavored, petitioner has offered a path to holding section 229 unconstitutional as applied. Contrary to the government's contention, *Raich* does not preclude as-applied challenges to federal statutes. *Raich* merely rejected an as-applied challenge when accepting it and excising home-grow marijuana "'could ... undercut' [Congress'] regulation of interstate commerce." *Raich*, 545 U.S. at 38 (Scalia, J., concurring). The government does not seriously contend that excising garden-variety assaults and poisonings would undercut implementation of the Convention. In any event, if this Court is concerned about an as-applied holding, the answer is not to adopt the government's heads-we-win-tails-you-lose approach in which facial challenges are disfavored but as-applied challenges are doomed. It is to hold section 229 unconstitutional, and let Congress devise implementing legislation that ensures the requisite nexus to the Convention or another matter of federal concern. Petitioner has not "concede[d]" that section 229 "is constitutional on its face." U.S.Br.10. She has maintained that if the statute applies here, then "[i]t is not justified by the Necessary and Proper Clause or any other grant of congressional authority." Petr.Br.57-58. As this Court implicitly recognized in confirming petitioner's standing, the application of a statute not justified by any grant of congressional authority is unconstitutional, whether viewed through an as-applied or facial lens. *Bond*, 131 S. Ct. at 2367 (Ginsburg, J., concurring).

powers to legislate on matters of true international concern. *See, e.g.*, U.S. Const. art. I, § 8, cl. 3, 10, 14. Indeed, the Framers gave Congress ample authority to legislate on the full range of matters within the founding-era conception of what treaties could legitimately address. It is precisely because modern treaties reach virtually every matter addressable by every level of government that the consequences of the government's position are so untenable. The government does not dispute—nor could it—that, under its theory, Congress could enact a general assault statute as a rational means of implementing a human rights convention. It merely observes that Congress has not done so yet, and assures that the ratification process will secure the States' consent should it choose to do so in the future. U.S.Br.10, 32.

The argument that constitutional checks and balances on the political branches suffice to preserve the federal-state balance has never met with much success in this Court. That "balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for" the judiciary "to admit inability to intervene when one or the other level of Government has tipped the scales too far." *Lopez*, 514 U.S. at 578 (Kennedy, J., concurring). Moreover, by focusing narrowly on the rights of States qua States, the government forgets that "the Constitution divides authority between federal and state governments for the protection of individuals." *New York v. United States*, 505 U.S. 144, 181 (1992). When the federal government "exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the 'consent' of state officials," *id.* at 182—let alone by

federal officials who indirectly represent the States. The agreement of two-thirds of the Senate, the President, and a foreign nation does not and cannot empower Congress to enact implementing legislation inconsistent with "the federal structure of our Government." *Bond v. United States*, 131 S. Ct. 2355, 2367 (2011).

The government contends that recognizing as much would upset its settled expectations stemming from *Missouri v. Holland*, 252 U.S. 416 (1920). But even putting to one side that the government cannot acquire a vested interest in exercising extra-constitutional powers, *INS v. Chadha*, 462 U.S. 919, 944 (1983), *Holland* did not reject all limits where treaties are concerned. It simply focused, as did the parties, on applying limits to the treaty itself, deeming it valid because it concerned "national interest of very nearly the first magnitude." *Holland*, 252 U.S. at 435. The government would dismiss this entire discussion as dicta, but it does not—and cannot—explain why the Court found it necessary "to consider the application of established rules to the present case," *id.*, if those rules established the validity of treaties "as a categorical matter." U.S.Br.40.

If anything in *Holland* is dictum, it is its lone sentence suggesting without analysis or explanation that any legislation implementing a valid treaty is *ipso facto* valid. *Holland*, 252 U.S. at 432. That suggestion contradicted prior decisions, *see, e.g.*, *Mayor of New Orleans*, 35 U.S. at 736, has not survived subsequent decisions, *see, e.g.*, *Reid*, 354 U.S. at 16-18, has never been relied upon by this

Court as a holding, and has generated substantial criticism, *see* Pet.17-23. Although the government notes a handful of cases that have cited *Holland*, only one did so for the proposition that a treaty can expand Congress' power, and that was in the unique context of Indian treaties, where a treaty recognizing tribal interests necessarily expands federal authority *vis-à-vis* the States. *See United States v. Lara*, 541 U.S. 193, 201 (2004). *Lara* did not even involve treaty-implementing legislation, and it certainly did not embrace the dubious notion that Congress' power to implement treaties knows no limits. *Neely v. Henkel* likewise does not endorse that extraordinary theory. *Neely* merely held that an extradition statute was an "appropriate" means of implementing an extradition treaty; it never suggested the statute escaped constitutional scrutiny altogether because it implemented a treaty. 180 U.S. 109, 121 (1901).[6]

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[6] The debate surrounding the Bricker amendment does not support the government's theory. That amendment responded in large part to *Holland*'s suggestion that treaties might not be subject to any constitutional limits because the Supremacy Clause describes treaties as made "under the authority of the United States" rather than "in pursuance" of the Constitution. *Holland*, 252 U.S. at 433. Fearing this dictum suggested treaties could override the Constitution, Senator Bricker proposed a constitutional amendment to eliminate self-executing treaties and render treaties enforceable only if Congress exercised its Article I powers to implement them. Most of the opposition to that proposal centered on eliminating the power to make self-executing treaties, not the suggestion that Congress' power to implement treaties is cabined by Article I. Although his amendment failed, Senator Bricker's concerns carried the day in *Reid v. Covert*, when this Court emphatically rejected any suggestion that a treaty may override the Constitution. *Reid*, 354 U.S. at 16-18.

At bottom, there is no treaty-implementing exception to this Court's "responsibility to declare unconstitutional laws that undermine the structure of government established by the Constitution." *NFIB v. Sebelius*, 132 S. Ct. 2566, 2592 (2012) (Roberts, C.J.). If section 229 reaches petitioner's conduct, it is just such a law, as it is neither a necessary nor a proper means of implementing the Convention.

III. Section 229 Need Not And Should Not Be Construed To Reach Petitioner's Conduct.

All these grave constitutional questions—and the even graver implications of the government's theory—can be avoided by construing section 229 not to reach petitioner's conduct. The government's interpretation would give the statute breathtaking scope. As the court of appeals recognized, under the government's reading, section 229 would turn every "kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." Pet.App.10 n.7. It likewise would convert every malicious use of chemicals, long the subject of state prosecutions for everything from assault to murder, into a federal offense with the kind of severe penalties associated with acts of terrorism. Equally troublingly, it would treat conduct like petitioner's as an international incident that would give other signatories (such as China, Russia, and Venezuela) rights under the Convention to force the United States to comply with burdensome inspection and verification procedures "required in cases of alleged use of chemical weapons." Conv., Verification Annex, Part XI(A)(2).

The government does not deny the breadth of its position or disclaim these absurd results. Rather, it simply invites the Court to ignore them. U.S.Br.13 n.3. But the very breadth of the government's interpretation demands a narrowing construction if one is available. Not only does its construction of section 229 implicate grave constitutional doubt, but it would profoundly upset the federal-state balance in the absence of the requisite "clear and manifest" indication of congressional intent to do so. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *Jones v. United States*, 529 U.S. 848, 858 (2000). Under the government's theory, the only thing preventing federal prosecution of every malicious use of chemicals is prosecutorial discretion. And as this case dramatically demonstrates, that is a woefully insufficient check. Using chemicals to seek revenge against a romantic rival no more implicates federal interests (let alone the concerns of the Convention) than the burning of a cousin's residence did in *Jones*.

Fortunately, section 229 "is not soundly read to make virtually every [malicious use of chemicals] in the country a federal offense." *Id.* at 859. Rather, sensibly construed, the statute's exclusion of toxic chemicals intended for "peaceful purposes," 18 U.S.C. § 229F(7)(A), provides the jurisdictional nexus the government insists is lacking. "Peaceful purposes" is a term of art used to distinguish between warlike and non-warlike conduct of nation-states. The handful of federal laws in which it is found all deal with international concerns and make sense only if the phrase is so understood. Petr.Br.52 (collecting statutes). Rather than dispute that "peaceful purposes" has this recognized meaning, the

government counters that garden-variety assaults and murders involving chemicals would not be described colloquially as peaceful. But statutory text must be interpreted "by reference" to "the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); Antonin Scalia & Bryan A. Garner, *A Note on the Use of Dictionaries*, 16 Greenbag 2d 419, 423 (2013) ("Because common words typically have more than one meaning, you must use the context in which a given word appears to determine its aptest, most likely sense."). There is certainly no reason to deprive this term of its ordinary international-law meaning in a statute avowedly designed to implement an international convention.

The government's attempts to suggest otherwise mischaracterize petitioner's argument. The government insists "peaceful purposes" cannot be interpreted to exclude conduct occurring "outside of war." U.S.Br.14. But petitioner concedes that warlike conduct includes use of chemical weapons "to intimidate or coerce a civilian population," "influence the policy of a government by intimidation or coercion," or "affect the conduct of a government by mass destruction, assassination, or kidnapping." 18 U.S.C. § 2331(1)(B). The activities the government identifies—targeted assassination of a foreign leader and retaliation against "an expatriate critic," U.S.Br.14—fit comfortably within that understanding.

Petitioner's interpretation is also consistent with the Convention's goal of sweeping more broadly than

the 1925 Geneva Protocol on chemical weapons. As the very analysis the government invokes underscores, the goal was to reach all warlike activities of nation-states, even those occurring outside the strict confines of "international armed conflict." U.S. Dep't of Def., Defense Treaty Inspection Readiness Program, Article-by-Article Analysis of Chemical Weapons Convention, http://bit.ly/1bjaP7X (Convention was designed to reach "purely domestic conflicts, civil wars, or state-sponsored terrorism"). Likewise, section 229 was designed to reach warlike activities of individuals, not to make an international incident out of every malicious use of chemicals. Congress confirmed that when it made section 229 a predicate offense for the federal prohibitions on harboring or providing material support to terrorists. 18 U.S.C. §§ 2339, 2339A.

Remarkably, the government insists Congress *did* intend to render conduct like petitioner's an act of terrorism. U.S.Br.17. That is implausible. While not every statute listed in sections 2339 and 2339A contains an express "terrorist intent element," U.S.Br.17, most contain jurisdictional hooks targeting the similar concerns. For instance, many prohibit crimes against government actors or property. *E.g.*, 18 U.S.C. §§ 351, 844(f), 930(c), 956, 1114, 1116, 1361, 1362, 2156. Others prohibit crimes that, by their nature, target a broad civilian population. *E.g.*, *id.* §§ 32, 831, 1091, 1992, 2332a, 2442, 2284. Some contain physical jurisdictional elements limiting their prohibitions to crimes implicating international interests—for instance, the arson provision the government cites applies only

"within the special maritime and territorial jurisdiction of the United States." *Id.* § 81; *see also, e.g., id.* §§ 2280, 2281, 2340A. But none of these provisions treats conduct anything like petitioner's as a terrorism predicate. In short, under the government's broad construction, section 229 sticks out like the proverbial sore thumb, but if "peaceful purposes" excludes non-warlike activities, then section 229 looks like the company it keeps.

In all events, the government's blithe assertion that these anti-terrorism measures and their serious consequences may be triggered by crimes "that have no necessary connection to terrorism," U.S.Br.17, is all the more reason to read the "terrorism predicates" narrowly. *Cf. Cleveland v. United States*, 531 U.S. 12, 25 (2000) (rule of lenity is "especially appropriate in construing ... a predicate offense under RICO"). For instance, the biological weapons statute is another such predicate. Construed as broadly as the government construes the chemical weapons statute, its prohibition on transferring a biological toxin "for other than prophylactic, protection, bona fide research, or other peaceful purposes," 18 U.S.C. § 175(c), would make it not only a crime, but an act of terrorism, for someone with a head cold to maliciously spit on another.

Nothing in the chemical weapons statute's examples of "peaceful purposes" prevents this Court from adopting petitioner's reasonable reading of that phrase. The government suggests the "common thread running through" these examples is "non-malicious and socially beneficial" activities. U.S.Br.14-15. But the common thread is just as

easily described as non-warlike activities in which nation-states engage. Indeed, these examples are identical to those included in the Convention's definition of what activities *undertaken by a nation-state* constitute "peaceful purposes." Conv. Art. II.9(a).

The government makes much of a provision exempting "individual self-defense device[s]" from the statute's prohibitions. 18 U.S.C. § 229C. But it ignores a critical aspect of the statute: Unlike the subsection defining "chemical weapon" to include "[a] toxic chemical and its precursor," the subsection defining "chemical weapon" to include "[a] munition or device, specifically designed to cause death or other harm through toxic properties of those toxic chemicals," does not exempt munitions or devices "intended for a purpose not prohibited." *Id.* § 229F(1)(A)-(B). Thus, without a specific exemption, pepper spray and mace devices would *always* be chemical weapons, even when possessed and used for non-warlike purposes. That Congress expressly exempted all such individual self-defense devices (regardless of whether intended for peaceful purposes) underscores that Congress intended the statute to apply only to the kinds of warlike activities with which the Convention is concerned.

In sum, as construed by petitioner, section 229 fully discharges our Nation's obligation to prohibit individuals from undertaking activities prohibited by the Convention without doing damage to the federalist structure of our Constitution. As construed by the government, section 229 radically alters the federal-state balance by federalizing ordinary

poisonings and assaults having nothing to do with the Convention's disarmament and proliferation concerns. Even without the grave constitutional questions the government's reading creates, the choice between those two paths should be clear. The Court should not lightly conclude that Congress intended to federalize a domestic dispute culminating in a thumb burn as a means of implementing an international arms-control agreement, but if that conclusion is unavoidable, Congress exceeded its constitutional authority.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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In The
Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

AMICUS BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS[1]

The American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys often appear before this Court as counsel either for a party, *e.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009), or for amicus, *e.g.*, *Snyder v. Phelps*, 131 S. Ct. 1207 (2011), addressing a variety of issues of constitutional law. The ACLJ previously filed as amicus in support petitioner at the petition stage of this case.

The decision below essentially holds that the Treaty Power, together with the Necessary and Proper Clause, gives the federal government *carte blanche* to enlarge its own domestic authority, in complete disregard of principles of federalism. This case therefore gravely implicates a whole host of issues of interest to the ACLJ.

SUMMARY OF ARGUMENT

The Third Circuit read this Court's opinion in *Missouri v. Holland*, 252 U.S. 416 (1920), as standing for the principle that the federal government can

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[1] The parties have consented to the filing of this brief. A blanket letter of consent from petitioner is on file with this Court. A consent letter from respondent is being filed herewith. No counsel for any party authored this brief in whole or in part. No such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

bootstrap the scope of its own power simply by negotiating a treaty and then implementing that treaty by statute. Such a theory would nullify the structural limits on federal power in the Constitution.

The Third Circuit also read the chemical weapons statute at issue here as in effect making a federal crime out of any misuse of virtually any chemical, and then upheld that enormously broad reading of the federal statute as a valid implementation of a treaty under the Necessary and Proper Clause. This holding improperly opens the door to a general federal police power.

This Court should reverse the decision below and clarify that the Treaty Power does not authorize the creation, by treaty, of a federal police power.

ARGUMENT

Amicus does not condone petitioner Carol Bond's attempts to injure her husband's paramour by the use of toxic substances. Such acts properly incur criminal liability under state law. The problem here, however, is that the *federal* government asserts the authority to treat Bond's misconduct as violative of a *federal* statute implementing, of all things, a chemical weapons treaty.

The legal theory the Third Circuit adopted to justify this extravagant exercise of federal power is wholly incompatible with any structural limitation on federal powers. This Court should reverse the judgment of the Third Circuit.

I. *MISSOURI v. HOLLAND* AND THE TREATY POWER CANNOT BE READ TO AUTHORIZE THE LIMITLESS EXPANSION OF DOMESTIC FEDERAL POWER BY TREATY.

The provisions of the Constitution must be read in harmony with each other. Just as it would make no sense to construe the Free Speech Clause (U.S. Const. amend. I) in a way that would negate the Copyright Clause (U.S. Const. art. I, § 8, cl. 8), likewise it would make no sense to construe the Treaty Power (U.S. Const. art. II, § 2, cl. 2) as negating the structural features that pervade the Constitution and create a federal government of only limited powers (*e.g.*, U.S. Const. art. I, § 8; *id.* amend. X). Insofar as the decision below reads *Missouri v. Holland*, 252 U.S. 416 (1920), as creating such a constitutional contradiction, this Court should in no uncertain terms repudiate such a view. To the extent *Holland* represents a departure from this basic constitutional rule, this Court should limit or overrule *Holland*.

The Treaty Power cannot be boundless. If it were, this would negate the remainder of the Constitution. This Court has already rejected that proposition: "treaties . . . have to comply with the provisions of the Constitution." *Reid v. Covert*, 354 U.S. 1, 16 (1957). As the *Reid* Court explained regarding the Supremacy Clause,

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights – let alone alien to our entire constitutional history and tradition – to construe Article VI as permitting the United States to exercise power under an international agreement without

> observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined.

Id. at 17.

Therefore, the Treaty Power cannot constitutionally authorize use of an *international* treaty to aggrandize the *domestic* powers of any branch of the federal government beyond the scope otherwise authorized by the Constitution. For example, a treaty could not

- confer legislative power on the federal executive;
- confer one-house veto or pardon power on the Congress; or
- confer advisory opinion authority on the federal judiciary.

For the same reason, a treaty could not abrogate federalism by conferring a general police power on the federal government. *See NFIB v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (Roberts, C.J.) (constitutional powers "must be read carefully to avoid creating a general federal authority akin to the police power").

To be sure, unconstitutional exercises of the Treaty Power through non-self-executing treaties may not readily be justiciable. Here, for example, the federal government is not prosecuting petitioner Bond directly under the pertinent chemical weapons treaty, the Convention on the Prohibition of the Development,

Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the Convention) (Pet. App. 146). But implementing statutes can, as in this case, produce justiciable cases and controversies. Moreover, even if the treaty is itself valid, that does not mean that the implementing legislation *ipso facto* must be constitutional. *See* Pet. Br. at 29 (giving hypothetical example of law implementing migratory bird protection treaty by banning the taking of *any* bird, whether migratory or not). Thus, the constitutionality of the *implementing statute* is properly at issue here.

Invocation of a treaty does not excuse disregard of the structural provisions of the Constitution. As explained above, a treaty obviously cannot constitutionally confer *legislative* power upon the *executive* of this country or otherwise violate the separation of powers. The same rule holds for violations of federalism. It would be plainly unconstitutional for the federal government to assert legislative authority that "presumes the existence of a federal police power." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 292 n.32 (1981). Consequently, a treaty cannot conjure into being such unconstitutional federal police power, whether in one fell swoop or one step at a time.

Notably, potential violations of the limits of federalism are limited only by the imagination and the willingness of treaty negotiators. Moreover, such violations know no political boundaries, i.e., they could advance (and correspondingly impair) agendas of any ideological stripe. For example, nations could agree by treaty universally to require – or forbid – each of the following:

- publicly funded education vouchers for private

schools;
- parental notice for abortion;
- restrictions on handgun possession near schools or churches;
- various regulatory limits on home businesses, home schools, or personal hobbies.

These are all generally matters of choice for state and local governments. *See, e.g.*, *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (school vouchers); *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) (parental notice for abortion); *United States v. Lopez*, 514 U.S. 549 (1995) (handguns near schools). The federal government may not dictate a one-size-fits-all result in either direction. Yet it is certainly conceivable that an Administration of one viewpoint or its opposite could negotiate, with a like-minded foreign sovereign, a treaty that would mutually impose nationwide rules – in either direction – on these matters. On the government's theory, once a willing Senate ratified such a treaty, Congress would suddenly have the new, expanded authority directly to dictate national legislative resolutions of these state-law questions.

It ought to be common ground that the Treaty Power could not authorize affirmative violations of constitutional rights (e.g., treaty-implementing legislation outlawing churches, banning signs and leaflets, abolishing jury trials, or suspending the writ of habeas corpus). *Reid v. Covert*, 354 U.S. at 17. But liberty under the Constitution is not limited to safeguards against affirmative invasions of personal rights. Federalism secures liberties as well. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). In the examples listed above (imposition or prohibition of

school vouchers, parental notice for abortion, etc.), federal legislation would not entail any affirmative violations of personal rights under this Court's precedents. Yet the federal imposition of a single rule upon the nation in one direction or the other would plainly distort the plan of structured, divided government that is the genius of the Constitution. The bulleted examples above, *supra* pp. 4, 6, therefore illustrate how an otherwise unlimited Treaty Power – or congressional power to implement treaties – would run roughshod over both the constitutional balance between the three federal branches (separation of powers) and the constitutional balance between the state and federal governments (federalism).

The Third Circuit opined that the solution may be to confine the language in *Holland* referring to the Treaty Power as presupposing that the Treaty Power retained its original meaning, i.e., as limited to such external objects as war, foreign affairs, and international commerce. Pet. App. 20-24. So understood, *Holland* would not stand for the proposition that any and all treaties *ipso facto* can validly authorize the expansion of federal power. Rather, only exercises of the Treaty Power *as originally understood* would authorize federal legislation. On this understanding, *Holland*'s broad language would simply not extend to treaties that would dictate domestic matters such as, say, the permissibility of various curricula for public education or, as here, the criminal treatment of poison suspects. Such an approach would effectively forestall the threat posed by an overreading of *Holland* and the unleashing of an overexpanded Treaty Power. Absent such a limited construction of the Treaty Power, however, the duty reposes with this Court to invalidate

implementing legislation that unconstitutionally disregards the limits of federalism.

II. THE NECESSARY AND PROPER CLAUSE DOES NOT AUTHORIZE THE FEDERAL GOVERNMENT, IN THE NAME OF TREATY IMPLEMENTATION, TO EXERCISE PLENARY POLICE POWER.

The Third Circuit concluded not only that the convention represented a valid exercise of the Treaty Power under *Holland*, but also that the Necessary and Proper Clause authorized the incredibly broad implementing statute at issue here. Pet. App. 33-36. This holding in effect approves the creation of a general federal police power by treaty.

The statute at issue here is 18 U.S.C. § 229, adopted to implement the Convention. That statute makes it a federal crime to "own, possess, or use . . . any chemical weapon." § 229(a)(1). The statute defines "chemical weapon" to include a "toxic chemical," § 229F(1)(A), which in turn "means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals." § 229F(8)(A). Given the immense variety of animals and their varying vulnerability to different chemicals (e.g., salt can kill slugs, borax can kill ants, garlic oil can kill aphids), it is safe to assume that this statute literally prohibits owning, possessing, or using any chemical substance whatsoever, except where a statutory

exception applies.[2]

There is in fact an exception, to the definition of chemical weapons, for chemicals intended for "[a]ny peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity, or other activity," § 229F(7)(A), so long as the "type and quantity" is "consistent with such a purpose," § 229F(1)(A). A crucial question of statutory interpretation is whether "purpose" (or "intended") refers to the *objective* purpose of the *substances* or the *subjective* purpose of the *defendant*.[3]

If the exception is viewed as exempting substances that, objectively, have peaceful purposes and are in quantities consistent with such purposes, then the miscellany of household items in the kitchen, garage, and medicine cabinet fall outside the statute – but so do the chemicals Mrs. Bond used, which were presumably part of the regular materials the Rohm and Haas chemical company maintained for its peaceful purposes. Pet. App. 3.

But if, on the other hand, a non-peaceful subjective purpose for the particular use by the defendant negates the exemption, then if a malicious purpose took Mrs. Bond outside the statute, *but see* Pet. Br. § II(C), such a purpose would also make a federal criminal out of everyone who deliberately misuses

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[2]In light of the enormous potential breadth of the statute at issue, and its arguable application to virtually every household in America, this Court should seriously consider whether a narrowing construction is available that would restrict the scope of the statute. *See* Pet. Br. § II.

[3]Another key question is the meaning of "peaceful" purpose. *See* Pet. Br. § II(C).

chemicals. Adding salt to another person's drink to spoil it, even as a gag, would be federal criminal use of a chemical weapon. Ditto for putting graffiti on a wall (paint is a "toxic substance" to some creatures, including presumably some tiny ones living on the surface being painted), poisoning a neighbor's annoying dog, and tinting purple the hair of a sleeping college roommate. These are wrongful acts of varying severity, the bread and butter of state and local criminal law. But the decision below embraces *federal* authority to proscribe all misconduct using chemicals of any kind.

The rationale of the Third Circuit was that this extraordinary expansion of federal criminal power was "necessary and proper" to implement the Treaty Power[4] as exercised in the Convention. Pet. App. 33-36. This approach improperly concludes that a comprehensive federal ban on "misuse of a chemical" is both necessary and proper to implement a treaty against chemical weapons. Under this faulty reasoning, it is "proper" to enlarge federal domestic powers beyond previous bounds in order to comply with an international treaty and "necessary" to go so dramatically beyond the treaty's focus on stockpiling

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[4]The Third Circuit did not address the federal government's abandoned, and later belatedly proposed, alternative defense under the Commerce Clause, Pet. App. 4 n.1, 27 n.14, and that argument is not before this Court. It bears mention that in any event the implementing statute does not contain any "jurisdictional hook" that might limit its scope to matters of interstate commerce. *See* Pet. Br. § I(D). The statute thus treats salt, vinegar, and every other chemical substance as if it were contraband subject to comprehensive federal regulation. *Cf. Gonzales v. Raich*, 545 U.S. 1 (2005).

chemical weapons as to make a domestic dispute a serious federal offense.

Resolution of this issue starkly poses the question whether the powers of the federal government are indeed "limited" under our Constitution, or if instead the structural limits on federal power can be negotiated away through agreements with foreign sovereigns. These weighty concerns go to the heart of liberty in America. "[F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power." *Bond*, 131 S. Ct. at 2364 (internal quotation marks and citations omitted). This Court should firmly reject the notion that the federal government can create for itself a federal police power, either incrementally or all at once, by the device of entering and ratifying treaties.

CONCLUSION

The decision below embraces a formula for negotiating away, by treaty, any and all structural limits upon federal authority. This Court should reverse the decision below.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR AMICUS CURIAE THE AMERICAN CHEMISTRY COUNCIL IN SUPPORT OF RESPONDENT

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Convention on Chemical Weapons: Hearing Before the Senate Committee on Foreign Relations, 104th Cong. (1996) 5, 15, 16, 17

Implementation of the Chemical Weapons Convention: Hearing Before the House Committee on Foreign Affairs, 103d Cong. (1994) 16

The Chemical Weapons Convention, S. Exec. Rep. No. 104-33 (1996) 17

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ICRC Advisory Serv. On Int'l Humanitarian Law, *Fact Sheet: 1993 Chemical Weapons Convention* (2003), *available at* http://www.icrc.org/eng/assets/files/other/1993_chemical_weapons.pdf 18

U.S. Congress, Office of Technology Assessment, *The Chemical Weapons Convention: Effects on the U.S. Chemical Industry*, OTA-BP-ISC-106 (Aug. 1993) 14

INTEREST OF AMICUS CURIAE[1]

The American Chemistry Council (ACC) is the nation's premier trade association for chemical manufacturers. Founded in 1872 as the Manufacturing Chemists' Association and known from 1979 until 2000 as the Chemical Manufacturers Association (CMA), ACC represents industry leaders and innovators who, through the science of chemistry, manufacture consumer products essential to everyday life. This $760 billion industry—a cornerstone of the nation's economy—accounts for 12 percent of all U.S. exports, employs nearly 800,000 Americans, and generates one-fifth of the world's chemical products. The chemical industry also contributes to more than 96% of all manufactured goods: ACC member firms, for instance, provide the chemistry used to produce life-saving medications and medical devices, the body armor used by our armed forces and law enforcement, light-weight components for vehicles that help improve gas mileage, and the durable, light-weight wind turbine blades that help provide green energy.

Many of the industrial and laboratory chemicals used in these advances, however, are toxic or produce toxic by-products. As a result, they have the potential to be diverted from their intended, beneficial uses—in manufacturing, agriculture, industry, education, and the arts—and converted into chemical weapons. To prevent that diversion and to protect both the national security and the national and international trade in

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[1] Pursuant to Rule 37.3(a), letters of consent to the filing of this brief are on file with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no person, other than amicus curiae, their members, or their counsel made any monetary contribution to the preparation or submission of this brief.

chemicals, U.S. industry—represented by, among others, ACC—emphatically supported the Chemical Weapons Convention (CWC) and its implementing legislation. The strict uniform controls on the *mis*use of toxic chemicals imposed under the comprehensive regime established by the CWC are essential not only to the eradication of trafficking in chemical weapons, but also to the promotion of free trade in chemicals in today's global economy.

ACC writes to underscore that the CWC, *see* Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. 103-21, at 278-451 (1993), and its implementing legislation, the Chemical Weapons Convention Implementation Act of 1998, *see* Pub. L. No. 105-277, 112 Stat. 2681-856 (codified at 18 U.S.C. §§ 229 *et seq.*), reasonably and necessarily seek both to eradicate the interstate and foreign markets in chemical weapons and to promote the national and international trade in chemicals. The implementing legislation is therefore a valid exercise of Congress's commerce power.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federal statute at issue here, 18 U.S.C. § 229, is a permissible exercise of Congress's authority to "regulate Commerce" "among the several States" and "with foreign Nations," U.S. Const. art. I, § 8, cl. 3, and "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its power to regulate interstate and foreign commerce, *id.* art. I, § 8, cl. 18. Section 229, which implements U.S. treaty obligations under the Chemical Weapons Convention (CWC), makes it unlawful for any person "knowingly" to "develop, produce, otherwise acquire, transfer directly or indi-

rectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon." 18 U.S.C. § 229(a)(1). Wholly apart from Congress's constitutional authority to enact necessary and proper legislation under the treaty power, Section 229 represents an appropriate exercise of Congress's commerce power, whether the statute is judged on its face or as applied to the specific facts of this case.

I. Section 229 is facially constitutional because it is part and parcel of a comprehensive regime enacted by Congress to eradicate the interstate and foreign markets in chemicals weapons and to promote the interstate and foreign commerce in chemicals.

Like the federal statute considered by this Court in *Gonzales* v. *Raich*, 545 U.S. 1 (2005), Section 229 is a component of a "comprehensive framework" for prohibiting the "production, distribution, and possession," *id.* at 24, of chemical weapons. That the statute may reach the intrastate production, transfer, possession, or use of such weapons in order to extinguish the interstate market for them is of no constitutional significance. Congress could reasonably have concluded that eradicating the interstate and foreign markets in chemical weapons required prohibiting intrastate activity. As this Court has determined, "[t]he notion that ... a discrete activity ... [may be] hermetically sealed off from the larger interstate ... market is a dubious proposition, and, more importantly, one that Congress could have rationally rejected." *Id.* at 30. That is decidedly the case here: Like the possession or consumption of homegrown marijuana, the intrastate manufacture, possession, or use of chemicals for illicit purposes could easily affect interstate or foreign markets.

To be sure, many chemicals within the ambit of the CWC and Section 229 are "dual-use": they have the potential to be used as chemical weapons or as precursors to chemical weapons, but they also have extensive beneficial uses in manufacturing, agriculture, industry, education, and the arts. That fact, however, does nothing to alter that Section 229 is a pillar in a comprehensive scheme to eradicate the national and international market in chemicals for illicit purposes. Under this Court's Commerce Clause precedents, it does not matter that Congress is attempting to suppress a market for the manufacture, transfer, and possession of certain chemicals only for particular purposes and not commerce in such chemicals altogether.

Section 229, moreover, is not merely part of a larger regulatory framework aimed at *eradicating* a commercial market; it is also squarely aimed at *fostering* the lawful national and international trade in chemicals for their beneficial uses. Petitioner's narrow focus on the disarmament objectives of the CWC ignores this vital commerce-enhancing objective. *See Wickard* v. *Filburn*, 317 U.S. 111, 128 (1942) ("The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon."); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937). Indeed, the text and history of the CWC and its implementing legislation make clear that one of its principal goals was the promotion of "free trade in chemicals." Conv. pmbl. ¶¶ 9, 10 (Pet. App. 147). Encouraging that commerce, the signatories ("States Parties") agreed, required a comprehensive prohibition on the use, production, or acquisition of chemicals for illicit purposes, not only by signatory nations but also by corporations and individuals. Otherwise, the everyday commerce in chemicals would be in constant jeopardy

of piecemeal trade-restricting measures aimed at securing what only uniform controls could accomplish. Such was the importance of the prohibition's scope that "[v]arious chemical industry spokespersons consider[ed] the CWC a *trade enabling regime* that could counteract trends in the future, in which U.S. chemical trade and investment could be constricted under even tighter export controls." *Convention on Chemical Weapons: Hearing Before the S. Comm. on Foreign Relations*, 104th Cong. 25 (1996) (statement of Sen. Lugar) (emphasis added).

Petitioner is thus wrong to insist that her conduct is far afield from the goals of the CWC and its implementing legislation. Even one misuse of a toxic chemical for malicious purposes—and certainly such misuses when viewed in the aggregate—could prompt a patchwork of severe domestic or international restrictions on the lawful trade in chemicals. Only by imposing comprehensive criminal controls on the diversion of chemicals into illicit channels and on the subsequent misuse of such chemicals could the CWC fully achieve its objectives. Just as Congress may regulate local wheat production to help stabilize the interstate market in wheat (per *Wickard*), Congress may regulate local misuses of chemicals that could lead to the impairment of lawful interstate or international trade in chemicals for their beneficial uses.

II. Petitioner insists that she challenges Section 229 only "as applied" to her conduct. Even were it permissible under *Raich* or *Wickard* to isolate her conduct and consider its specific nexus to or effect on interstate or foreign commerce, consideration of the facts of this case only underscores why Congress may regulate Petitioner's conduct. Petitioner has pled guilty to or otherwise admitted facts establishing that her mis-

use of toxic chemicals is tied to a channel of interstate commerce and was facilitated by a transaction in the interstate market. Her criminal conduct is thus well within Congress's commerce power. That Section 229 on its face is not limited to such circumstances does not permit Petitioner to lodge an overbreadth objection. *E.g.*, *Sabri* v. *United States*, 541 U.S. 600, 609 (2004). As this Court has explained, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground" that it might apply "to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U.S. 17, 21 (1960).

ARGUMENT

I. CONGRESS HAD THE AUTHORITY UNDER THE COMMERCE CLAUSE TO ENACT SECTION 229

Congress's constitutional authority to regulate interstate and foreign commerce includes the power to prohibit even wholly local conduct where Congress reasonably decides that doing so is necessary either to eradicate an interstate or foreign market or, conversely, to promote or protect one. Section 229 is facially valid under either theory: The CWC and its implementing legislation establish a comprehensive regulatory scheme that serves both to suppress the national and international market in toxic chemicals for illicit purposes and to promote the lawful market in those chemicals for beneficial uses.

A. Congress's Power To "Regulate" Commerce Includes The Power To Eradicate Or To Promote Commerce

The Constitution commits to Congress the authority "[t]o regulate Commerce with foreign Nations, and

among the several States," U.S. Const. art. I, § 8, cl. 3, and to "make all Laws which shall be necessary and proper for carrying into Execution" that power, *id.* art. I, § 8, cl. 18.[2] In exercising this authority, Congress—in addition to regulating the "channels" or "instrumentalities" of "interstate commerce"—may regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce," whether Congress's aim is to eliminate the broader market or to promote it. *Gonzales* v. *Raich*, 545 U.S. 1, 16-17 (2005); *Wickard* v. *Filburn*, 317 U.S. 111, 128 (1942).

Congress's authority to "eradicate" or "prohibit commerce in a particular commodity" under a comprehensive regulatory scheme is well established. *Raich*, 545 U.S. at 19 n.29. In *Raich*, the Court upheld Congress's effort in the Controlled Substances Act (CSA) to "extinguish the interstate market in Schedule I controlled substances." *Id.* at 39 (Scalia, J., concurring in judgment). The Court held that to accomplish that legitimate objective, Congress could prohibit the local possession or consumption of homegrown marijuana, in part because the "diversion of [such] homegrown marijuana" to interstate markets could "frustrate the federal interest in eliminating [all] commercial transactions." *Id.* at 19; *see id.* at 39-40 (Scalia, J., concurring in the judgment) (Congress may "prohibit[] almost all intrastate activities related to Schedule I [controlled] sub-

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[2] Congress's authority to regulate foreign commerce is at least as broad as its authority to regulate interstate commerce; indeed, it may be broader. *See Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 448 (1979) (noting "evidence that the Founders intended the scope of the foreign commerce power to be the greater").

stances" as a "necessary part of a larger regulation" of the interstate market).

Importantly, it did not matter to the Court's reasoning that any single local possession of marijuana might not materially affect the interstate market. "The fact that ... [the] impact [of possession of marijuana by one individual] on the market was 'trivial by itself,'" the Court explained, "was not a sufficient reason for removing [the conduct] from the scope of federal regulation." *Raich*, 545 U.S. at 20; *see also United States* v. *Lopez*, 514 U.S. 549, 558 (1995) ("'[T]he *de minimis* character of individual instances ... is of no consequence.'"); *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (similar). The Court accordingly "refuse[d] to excise individual components of th[e] larger scheme," concluding that it was "of no moment" that the federal regulation "ensnares some purely intrastate activity." 545 U.S. at 22.

The converse proposition, namely that the commerce power permits Congress to "'promote'" or "'foster'" interstate commerce, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 36-37 (1937), is likewise beyond dispute. *Wickard* involved a congressional effort through the Agricultural Adjustment Act of 1938 to stabilize and promote the interstate market in wheat. *See* 317 U.S. at 115; *Raich*, 545 U.S. at 19 n.29. The Court held that Congress, as part of a comprehensive effort to normalize the market for wheat, could regulate the production of wheat grown and consumed on a family farm because such consumption would depress demand for wheat in the interstate market: "wheat consumed" on a family farm "if wholly outside the scheme of federal regulation would have a substantial effect in defeating and obstructing [the statute's] purpose to stimulate [interstate] trade ... at increased prices."

Wickard, 317 U.S. at 129. As in *Raich*, the Court concluded that although an individual farm's "contribution to the demand for wheat may be trivial," that was "not enough to remove [it] from the scope of federal regulation." *Id.* at 127-128.[3]

Read together, these precedents establish that whether Congress's purpose is to eradicate an interstate or foreign market or to protect and stabilize it, Congress may regulate even wholly local activity where doing so is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Lopez*, 514 U.S. at 561. The difference between eliminating an interstate market or fostering interstate commerce is "of no constitutional import." *Raich*, 545 U.S. at 19 n.29. "[T]he commerce power permits Congress ... to facilitate interstate commerce by eliminating potential obstructions, and to restrict it by eliminating potential stimulants." *Id.* at 35 (Scalia, J., concurring in the judgment).

Furthermore, Congress's determination that regulation is necessary to achieve either end is subject to only "modest" review. *Raich*, 545 U.S. at 22; *see Hodel* v. *Indiana*, 452 U.S. 314, 323-324 (1981). "[T]he rele-

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[3] The Court in *Lopez* distinguished *Wickard* from its examination of the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), on the ground that Section 922(q) was not "an essential part of a larger regulation of economic activity." *Lopez*, 514 U.S. at 561; *see also United States* v. *Morrison*, 529 U.S. 598, 610 (2000). Here, however, "[b]ecause the [Act] is a statute that directly regulates economic, commercial activity ... [there is] no doubt on its constitutionality." *Raich*, 545 U.S. at 26. Indeed, such economic activity is doubly present—the statute suppresses the market involving the misuse of toxic chemicals and promotes the market for those chemicals' proper and beneficial uses.

vant inquiry is simply 'whether the means chosen are "reasonably adapted" to the attainment of a legitimate end under the commerce power[.]'" *United States* v. *Comstock*, 130 S. Ct. 1949, 1957 (2010) (quoting *Raich*, 545 U.S. at 37 (Scalia, J., concurring in the judgment)); *see also United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2502-2503 (2013).[4]

B. Section 229 Is Facially Valid Under Either A Market-Eradication Theory Or A Market-Promotion Theory

Under these principles, Congress had the constitutional authority to enact Section 229 as part of a comprehensive regime regulating interstate and foreign commerce in toxic chemicals, whether its purpose was to eradicate a market or to promote one. Here, those markets are interrelated because some toxic chemicals are dual-use—they can be used as weapons to harm (or as precursors to such weapons), or they can be used for many beneficial purposes in industry, agriculture, education, medicine, and the arts. For example, thiodi-

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[4] Nor can there be an "objection to the assertion of the [commerce] power ... that its exercise is attended by the same incidents which attend the exercise of the police power of the states." *United States* v. *Darby*, 312 U.S. 100, 114 (1941); *see also Raich*, 545 U.S. at 41 (that Congress "regulates an area typically left to state regulation ... is not enough to render federal regulation an inappropriate means") (Scalia, J., concurring in the judgment). The Constitution does not prohibit federal prosecution in an area of overlapping federal and state authority. *See Cleveland* v. *United States*, 329 U.S. 14, 16, 19 (1946) (Mann Act's criminalization of interstate transportation of women for "'purpose of prostitution or debauchery, or for any other immoral purpose'" not unconstitutional invasion of traditional area of state regulation); *compare* Pet. Br. 21-22 ("the federal government may step into the States' traditional criminal realm ... when it targets conduct that implicates matters of national or international, not just local, concern").

gycol is a sulfur-containing solvent that is a common component in legitimate products (such as ballpoint pen ink) but can also be converted into a mustard agent.

There are, accordingly, two relevant national and international markets for toxic chemicals—a predominant market for legitimate commercial and other beneficial purposes, and a black market involving chemical weapons (including chemicals knowingly manufactured, possessed, transferred, or used for illicit purposes). The text and history of the Convention and its implementing legislation make clear that Section 229's animating objectives were to suppress the illicit market and to promote the legitimate one. Congress has the power under the Commerce Clause to advance both of these interrelated aims, placing Section 229 squarely in the heartland of Congress's Commerce Clause authority.

1. Market eradication

A principal objective of the CWC, of course, is to prohibit the international distribution or transfer of chemical weapons. *See* Conv. pmbl. ¶ 10 (noting the goal of "complete and effective prohibition ... of chemical weapons") (Pet. App. 147). And when Congress enacted Section 229, it was fulfilling the obligation of the United States as a party to the CWC to enact domestic legislation, "including ... penal legislation," prohibiting individuals "from undertaking any activity prohibited to a State Party" under the Convention, Conv. art. VII (Pet. App. 160)—namely, making it unlawful for any person "knowingly" to "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon," 18 U.S.C. § 229(a)(1).

That comprehensive prohibition has the potential, of course, to reach local activity—for example, the wholly local manufacture, possession, or use of a chemical for illicit purposes. But that does not render Congress's exercise of authority constitutionally infirm. "Prohibiting the intrastate possession or manufacture of an article of commerce is a rational (and commonly utilized) means of regulating commerce in that product." *Raich*, 545 U.S. at 26; *see also id.* at 27 ("use[] 'for personal medical purposes' ... [not] a distinguishing factor"). And where Congress regulates a noneconomic intrastate activity because "the failure to do so 'could ... undercut' its regulation of interstate commerce"—"[that] is not a power that threatens to obliterate the line between 'what is truly national and what is truly local.'" *Raich*, 545 U.S. at 38 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514 U.S. at 567-568).[5]

Moreover, given that chemicals for illicit purposes could easily be drawn into interstate commerce, Congress's determination that eradicating the interstate and foreign markets for chemical weapons also required the regulation of their intrastate possession and use is well founded. In *Raich*, the Court explained that Congress could reasonably have determined that regulating intrastate, even medicinal, use of marijuana was reasonably necessary to control illicit trafficking in that commodity because law enforcement officials often cannot ascertain whether it traveled in interstate commerce or not. Excepting certain intrastate conduct

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[5] Indeed, to illustrate this point, the Court in *Raich* cited several treaty-implementing criminal statutes materially indistinguishable from Section 229, including the Biological Weapons Statute, 18 U.S.C. § 175(a); the Nuclear Materials Statute, 18 U.S.C. § 831(a); and the Plastic Explosive Statute, 18 U.S.C. § 842(n). *See Raich*, 545 U.S. at 26 & n.36.

from the statute would undermine Congress's ability to protect public safety and the national security. *See* 545 U.S. at 22 (noting both "enforcement difficulties" in distinguishing between local and interstate marijuana and "concerns about diversion into illicit channels"); *see also id.* at 40 (Scalia, J., concurring in the judgment) ("impossible to distinguish" intrastate manufacture and distribution from interstate manufacture and distribution). The same is true under Section 229. There is no question that the market in chemicals is national, indeed international, in character. The overall statutory scheme to eliminate chemical weapons in all their forms would be undermined if Congress could not reach certain fabrications or uses of chemicals as weapons merely because they occurred intrastate.

To be sure, in seeking to eradicate the interstate and foreign markets in chemical weapons, the CWC and its implementing legislation reach not only fully constituted chemicals loaded into a bomb or munitions shell, but also toxic, dual-use chemicals that are manufactured, transferred, used, or possessed for illicit purposes.[6] But the fact that Congress is not seeking to extinguish commerce in such chemicals altogether, but only commerce in chemicals manufactured, transferred, or possessed for illicit purposes, does not alter the constitutional analysis. It is well established that Congress has plenary authority to prohibit the interstate or foreign transfer of particular items or persons for specific harmful purposes, even when it does not prohibit such

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[6] Under the statute, a "chemical weapon" includes the "knowing" misuse of all chemicals that "can cause death, temporary incapacitation or permanent harm to humans or animals," 18 U.S.C. § 229F(8)(A), and the statute prohibits all non-exempt persons from acquiring, producing, possessing, transferring or using such weapons. *Id.* § 229(a)(1).

interstate and foreign activity altogether. *See, e.g.*, *Hoke* v. *United States*, 227 U.S. 308 (1913) (upholding constitutionality of Mann Act as applied to interstate transportation of a woman for purposes of prostitution); *cf. McElroy* v. *United States*, 455 U.S. 642, 659 (1982) (Stevens, J., dissenting) (noting that "a host of federal criminal statutes ... prohibit the interstate transportation of stolen motor vehicles, forged checks, prostitutes, explosives [for improper purposes], ... counterfeit phonograph records, and numerous other items"). Nothing in the circumstances here requires a different result.

2. Market promotion

Conversely, but relatedly, Congress could reasonably have concluded that, by prohibiting the local possession, manufacture, or use of chemical weapons, Section 229 would "'foster,'" "'promote,'" or "'protect'" national and international commerce in chemicals for their many beneficial uses. *Jones*, 301 U.S. at 36-37.[7] Absent comprehensive criminal interdiction of the misuse of chemicals, the lawful domestic and foreign trade in chemicals could be undermined by piecemeal regulations that restrict the trade in chemicals with even a potential for harm.

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[7] As a report prepared for Congress explained, "because of the large size and economic importance of the U.S. chemical industry and allied sectors, the CWC has important implications not only for national security but also for the health of the American economy." U.S. Congress, Office of Technology Assessment, *The Chemical Weapons Convention: Effects on the U.S. Chemical Industry*, OTA-BP-ISC-106 (Aug. 1993) (noting that "[t]he United States is home to roughly 20,000 chemical manufacturing plants, or about a third of the world's total chemical production capacity" and that, "[i]n 1992, *net* exports of U.S. chemical products were worth about $16 billion").

Before the advent of multilateral controls, there was substantial concern throughout the industry that misuses of toxic chemicals for harmful purposes, whether carried out by nations or by individuals, could substantially affect the national and international chemical markets by prompting piecemeal restrictions and other barriers to trade. Petitioner's conduct in this case illustrates that concern. Petitioner acquired highly toxic chemicals through the Internet and from her industry employer, and she used those chemicals to repeatedly carry out attacks on another person.[8] Such conduct, whether considered alone or in the aggregate, might well lead governments to restrict the Internet sale of chemicals or to prohibit trade in certain chemicals given the ease with which Petitioner was able to obtain them for criminal purposes.

Comprehensive multilateral regulation of the misuse of chemicals was the answer to this problem—and it proved extremely effective. Under a precursor regime to the Convention, controls agreed to by nations collectively known as the Australia Group resulted in more than a doubling of investments in developing countries by American chemical manufacturers, "from $4.05 billion to $9.98 billion" annually. *Convention on Chemical Weapons: Hearing Before the S. Comm. on Foreign Relations*, 104th Cong. 85-86 (1996) (statement of Dr. Brad Roberts, Institute of Defense Analysis)

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[8] The two chemicals Petitioner used in the attacks—potassium dichromate and 10-chlorophenoxarsine (an arsenic derivative)—are undeniably "toxic chemicals" under the Act. *See* 18 U.S.C. § 229F(8)(A). They are lethal even in small quantities, and the amounts Petitioner used, on even a single occasion, were many times those required for toxic or potentially fatal doses. *See* U.S. Br. 4-5, 13; Pet. App. 49 & n.1; JA 42-64.

(noting the "controls embodied in the CWC are not trade restraints but trade enablers").

The CWC was accordingly an effort—not only by States Parties but also by civil industry—to codify and make enduring a comprehensive regulatory regime that would, through a comprehensive prohibition, deter the imposition of piecemeal restrictions and foster the free flow of commerce. The Convention itself, as ratified, provides that "the complete and effective prohibition of the development, production, acquisition, stockpiling, retention, transfer and use of chemical weapons" is a "necessary step" to "promote the free trade in chemicals." Conv. pmbl. ¶¶ 9, 10 (Pet. App. 147). And throughout the drafting and ratification process, U.S. industry—represented by the ACC (formerly the CMA), the Society of Chemical Manufacturers and Affiliates (SOCMA, formerly the Synthetic Organic Chemical Manufacturers Association), the Pharmaceutical Research and Manufacturers of America (PhRMA), the Biotechnology Industry Organization (BIO), and the American Chemical Society (ACS)—strongly supported the chemical weapons prohibition, in part because comprehensive regulation would lift "the cloud of suspicion or concern ... from the chemical industry" and because the Convention would put "in place" procedures "to ensure that [the chemical industry's] products and ... processes are not used for some illegitimate purpose." *Implementation of the Chemical Weapons Convention: Hearing Before the H. Comm. on Foreign Affairs*, 103d Cong. 24 (1994) (statement of Dr. Will Carpenter, Chemical Manufacturers Association).

"[C]lear rules and fair controls," advocates for the industry informed Congress, were critical to fostering legitimate enterprise. *See Convention on Chemical Weapons: Hearing Before the S. Comm. on Foreign Re-*

lations, 104th Cong. 85 (1996) (statement of Dr. Brad Roberts, Institute of Defense Analysis) ("Since the creation of the Australia Group ... U.S. industry has prospered greatly."). Indeed, because the proposed controls would be uniform across all States Parties, the chemical industry perceived the CWC as a "trade enabling regime." *Convention on Chemical Weapons: Hearing Before the S. Comm. on Foreign Relations*, 104th Cong. 25 (1996) (statement of Sen. Lugar).

By contrast, chemical industry representatives cautioned that Congress's failure to ratify and implement the Convention could have catastrophic effects on national and international trade. Such a failure, representatives testified, could lead U.S. industry to be "'branded as a potentially unreliable supplier of chemicals to the global market,'" and could have "'a devastating impact on the U.S. chemical industry's ... balance of trade.'" *The Chemical Weapons Convention*, S. Exec. Rep. No. 104-33, at 219 (1996); *see also Chemical Weapons Convention: Hearing Before the S. Comm. on Foreign Relations*, 103d Cong. 117 (1994) (statement of Hon. Ronald F. Lehman, former Director of the Arms Control and Disarmament Agency) ("[T]he CWC codifies the principle that no nation should trade in dangerous materials with those who will not accept international non-proliferation norms.").[9]

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[9] The industry was also motivated by the simple and laudable desire to ensure that its products would not be put to illicit uses. As the then-President and CEO of the CMA explained, the industry "does not produce chemical weapons ... [but] [w]e do ... make products used in medicine, crop protection, and fire prevention, which can be converted into weapons agents ... [and] [w]e take [our] responsibility [to prevent illegal diversions of our products] very, very seriously." *Chemical Weapons Convention: Hearing*

Indeed, so important was this free-trade objective that States Parties, including the United States, tailored the weapons prohibition in an attempt to exclude "any restrictions ... which would restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." Conv. art. XI; *compare* 18 U.S.C. § 229F(1)(A), (7)(A) (eliminating from the definition of a "chemical weapon" a toxic chemical with an intended "peaceful ... industrial, agricultural, research, medical or pharmaceutical" purpose); *see also* ICRC Advisory Serv. On Int'l Humanitarian Law, *Fact Sheet: 1993 Chemical Weapons Convention* (2003), *available at* http://www.icrc.org/eng/assets/files/other/1993_chemical_weapons.pdf ("the Convention promotes and supervises the development of the chemical industry for purposes not prohibited under its terms").[10]

When the President submitted the Convention to the Senate for its advice and consent to ratification, the State Department's article-by-article analysis of the Convention faithfully explained that the Convention "balances the desire to encourage free trade in chemi-

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Before the S. Comm. on Foreign Relations, 105th Cong. 197 (1997) (statement of Frederick L. Webber).

[10] A provision of the Convention entitled "Economic and Technological Development" elaborates on this relationship. It broadly provides that "[t]he provisions of this Convention shall be implemented in a manner which avoids hampering the economic or technological development of the States Parties, and international cooperation in the field of chemical activities for purposes not prohibited under this Convention including the international exchange of scientific and technical information and chemicals and equipment for the production, processing or use of chemicals for purposes not prohibited under this Convention." Conv. art. XI ¶ 1.

cals, equipment and technology with the desire to prevent the proliferation of chemical weapons" and thus the scope of the prohibition on chemical weapons "represents one of the most difficult compromises reached in the Convention."[11] The Senate Report recommending that the Senate give its advice and consent to ratification of the Convention echoed that the Convention's objective was "to balance free trade in legitimate chemicals with preventing the proliferation of chemical weapons" and that the Convention "should not be implemented in a manner that hampers the economic and technological development of States Parties or international cooperation in chemical activities for [legitimate] purposes." S. Exec. Rep. No. 104-33, at 5.

The record before Congress thus abundantly establishes that fostering the lawful trade in chemicals drove both the presence and the scope of the "penal legislation" required by the Convention. Conv. art. VII, ¶ 1(a), (b). Congress could readily have concluded that an international regulatory floor would help to "liberaliz[e] the existing system of export controls applicable to the [chemical] industry's products, technologies, and processes," S. Exec. Rep. No. 104-33, at 214, and that a comprehensive interdiction of chemical misuse would make market-restrictive efforts—both foreign and domestic—much less likely. Section 229 is thus a necessary part of a comprehensive federal regime aimed at "protect[ing] and stabiliz[ing]" domestic and international commerce in chemicals. *Raich*, 545 U.S. at 19 n.29; *Wickard*, 317 U.S. at 128.

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[11] Message from the President of the United States Transmitting The Convention on the Prohibition of Development, Production, Stockpiling and Use of Chemical Weapons and On their Destruction, Opened for Signature and Signed by the United States at Paris on January 13, 1993, S. Treaty Doc. No. 103-21, at 72.

II. SECTION 229 MAY BE CONSTITUTIONALLY APPLIED ON THE FACTS OF THIS CASE

Petitioner has repeatedly stated that she is challenging the statute only "as applied" to her conduct. Even assuming that under *Raich* and *Wickard* an as-applied challenge is coherent, consideration of the specific facts here only underscores why Congress may regulate Petitioner's conduct. Petitioner's malicious use of chemicals had a direct nexus to interstate commerce. She cannot escape the consequences of her crime on the ground that Section 229 might, as applied to different defendants, in separate cases, on dissimilar facts, exceed Congress's Commerce Clause authority.

A. Petitioner Challenges Section 229 Only "As Applied" To Her

There can be no question that Petitioner challenges Section 229 only as applied to her conduct. As the Third Circuit found, in her supplemental briefing after remand from this Court and at oral argument before the court of appeals, Petitioner "abandoned her facial challenge to [Section 229]" and instead "articulated" an "as-applied challenge." Pet. App. 7 n.5. Petitioner maintains that same position here. In seeking this Court's review, Petitioner described her argument in as-applied terms, contending that Section 229 "exceeded Congress' enumerated powers as applied to her conduct." Pet. 1. Her question presented is similarly "as applied." Pet. Br. i. And references to the case-specific scope of Petitioner's challenge abound in her opening brief, making the character of her challenge unmistakable.[12]

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[12] *E.g.*, Pet. Br. 2 (arguing "the underlying facts [in this case] are far removed from ... any issues of national or international im-

B. Section 229 May Constitutionally Be Applied To Petitioner's Conduct

Because Petitioner brings only an as-applied challenge to Section 229, she must show that the provision "is invalid as applied to [her] conduct." *Bond* v. *United States*, 131 S. Ct. 2355, 2367 (2011) (Ginsburg, J., concurring); *accord United States* v. *Salerno*, 481 U.S. 739, 745 n.3 (1987). Petitioner cannot make that showing.

Petitioner pled guilty to a series of malicious uses of chemicals over several months. She admitted purchasing one of the toxic chemicals she used in her attacks, potassium dichromate, over the Internet. *See, e.g.*, Pet. Br. 9 (Bond "purchased ... potassium dichromate ... from Amazon.com"); JA 39 (Plea Colloquy). That purchase connects Petitioner's conduct to two separate lines of Commerce Clause jurisprudence.

1. Channels of interstate commerce

"It is well established that the Commerce Clause gives Congress authority to 'regulate the use of the channels of interstate commerce.'" *Pierce Cnty., Washington* v. *Guillen*, 537 U.S. 129, 146 (2003). In particular, "'it has long been settled'" that Congress has the constitutional "'authority ... to keep the channels of interstate commerce free from immoral and injurious uses.'" *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964). This font of congressional authority, the Court has said, "'has been frequently sustained,

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portance"); *id.* at 19 ("The only alternative to th[e] saving constructions is to hold section 229 unconstitutional as applied to petitioner."); *id.* at 21-22 (Congress may "enact criminal statutes," but only when Congress "targets conduct that implicates matters of national or international, not just local, concern").

and is no longer open to question.'" *Id.*; *see Lopez*, 514 U.S. at 558.

That congressional authority is applicable here based on Petitioner's purchase of potassium dichromate through Amazon.com. The Internet is undoubtedly a channel of interstate commerce; indeed, in today's digital age, the Internet is one of the principal means by which interstate and international commerce are carried out. *See Reno* v. *ACLU*, 521 U.S. 844, 853 (1997) (the Internet is comparable to "a sprawling mall offering goods and services"). The courts of appeals have had no difficulty concluding that because the Internet is a "means to engage in commerce and [a] method by which transactions occur,'[t]he Internet is a[] ... channel of interstate commerce.'" *United States* v. *Trotter*, 478 F.3d 918, 921 (8th Cir. 2007); *see United States* v. *Sutcliffe*, 505 F.3d 944, 952-953 (9th Cir. 2007); *United States* v. *MacEwan*, 445 F.3d 237, 245 (3d Cir. 2006); *United States* v. *Hornaday*, 392 F.3d 1306, 1311 (11th Cir. 2004).

Congress thus may regulate Petitioner's conduct based on its recognized authority to keep channels of domestic and international commerce free from "'immoral and injurious uses.'" *Heart of Atlanta Motel*, 379 U.S. at 256. Petitioner's purchase of a chemical over the Internet for the purpose of chemical attacks on Myrlinda Haynes was an immoral and injurious misuse of a channel of commerce. Given Petitioner's admission that she purchased the potassium dichromate "online through Amazon.com," JA 39, Congress may prohibit her conduct under Section 229.

That Petitioner appears to have pled guilty only to the "use" of a chemical weapon, *e.g.*, JA 40-41 (Plea Colloquy), does not foreclose reliance on a channels analy-

sis. Congress's power to prevent the misuse of channels of interstate commerce includes the ancillary authority to regulate the use of items that have travelled in interstate commerce, where doing so would help to keep a channel itself free of immoral or injurious commercial activity. In *Pierce County*, for example, this Court held Congress had the authority, in part under a channels analysis, to prohibit information compiled in connection with federal highway safety programs from being admitted at trial. 537 U.S. at 147-148. Although the statutory provision at issue did not directly regulate channels of commerce, the Court reasoned that the provision could be justified as an effort to reduce hazardous conditions in those channels: "Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement ... would result in more diligent efforts to collect the relevant information, more candid discussions of hazardous locations, better informed decisionmaking, and, ultimately, greater safety on our Nation's roads." *Id.* at 147. By analogy, Congress here reasonably could have believed that prohibiting the use of chemicals for malicious purposes would help to keep channels of commerce free of immoral and injurious transactions that facilitate such uses.

2. Conduct facilitated by an interstate commercial transaction

Independently, Congress may regulate the use of items that have travelled through the channels of interstate commerce—at least where (as here) there is a direct and temporal nexus between the item and interstate commerce—because such items are "things in interstate commerce," *Lopez*, 514 U.S. at 558, or "hav[e] a substantial relation to interstate commerce," *id.* at 559.

This Court's decisions have long held that Congress may regulate the possession or use of products that have travelled in interstate commerce. In *Scarborough* v. *United States*, 431 U.S. 563 (1977), for example, this Court addressed the scope of the federal prohibition on possession of firearms by felons, a statute that required the firearm at issue to have travelled in interstate commerce. Although not addressing a constitutional challenge, the Court concluded, without a word about the constitutional implications, that Congress intended to require nothing "more than a minimal nexus that the firearm have been, at some time, in interstate commerce." *Id.* at 575. The Court found there was no basis for construing the statute narrowly, as "Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred." *Id.* at 577; *see United States* v. *Bass*, 404 U.S. 336, 347-349 (1971) (reading the same statute to require that the interstate nexus be satisfied for any possession conviction, in part, to avoid federalism concerns); *see also Lopez*, 514 U.S. at 561-562 (suggesting that, per *Bass*, Congress may regulate firearm possessions that have "an explicit connection with or effect on interstate commerce").

Congress has followed the Court's lead by enacting numerous federal statutes that require travel in or contact with interstate commerce, including the federal firearms statute amended in the wake of *Lopez*, 18 U.S.C. § 922(q)(2) (applying to firearms that have "moved in that otherwise affect[] interstate or foreign commerce"); the federal carjacking statute, 18 U.S.C. § 2119 (applying to anyone who, "with the intent to cause death or serious bodily harm[,] takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce ... by force and vio-

lence"); and the federal child pornography statute, 18 U.S.C. § 2252(a)(4)(B) (applying to anyone who "knowingly possesses" materials "which contain any visual depiction that has been mailed, or has been shipped or transported using any means or facility of interstate or foreign commerce"). Such statutes have uniformly been upheld by the courts of appeals on the theory that there is a sufficient "case-by-case" connection to or "'effect on interstate commerce.'" *United States* v. *Danks*, 221 F.3d 1037, 1039 (8th Cir. 1999) (upholding revised 18 U.S.C. § 922(q)); *see also United States* v. *Polanco*, 93 F.3d 555, 563 (9th Cir. 1996) (firearms statute); *United States* v. *Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (firearms statute); *United States* v. *Cortes*, 299 F.3d 1030, 1035-1037 (9th Cir. 2002) (carjacking statute); *United States* v. *Robinson*, 137 F.3d 652, 655-656 (1st Cir. 1998) (child pornography statute).

This line of Commerce Clause jurisprudence independently forecloses Petitioner's as-applied challenge. Petitioner has admitted to using a toxic chemical, potassium dichromate, that she purchased in interstate commerce to carry out chemical attacks on Haynes. The "explicit connection," *Lopez*, 514 U.S. at 562, between interstate commerce and Petitioner's wrongful conduct makes application of Section 229 to that conduct valid under the Commerce Clause.

C. That Section 229 Sweeps More Broadly Than The Facts Of This Case Does Not Aid Petitioner's As-Applied Challenge

Section 229, of course, is not limited by its terms to the circumstances presented by this case. But the fact that the statute may reach beyond malicious uses of chemicals with a nexus to interstate commerce is of no moment in the context of an avowed as-applied chal-

lenge. Petitioner may not escape criminal prosecution for conduct that Congress may proscribe under Section 229 based on the theory that the statute might in other cases exceed Congress's enumerated powers. As this Court has repeatedly said, "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground" it might apply "to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U.S. 17, 20 (1960). Indeed, as the Chief Justice recently explained, the "relevant inquiry" in a case raising an as-applied challenge is whether Congress exceeded its "Article I power" as the statute is applied to the particular defendant raising the challenge. *Kebodeaux*, 133 S. Ct. at 2506 (concurring in the judgment); *see id.* at 2505 (Congress had Article I authority to enact SORNA "as applied" to Kebodeaux, who had served in the military, based on the Military Regulation and Necessary and Proper Clauses, although SORNA applies to all sex offenders). The United States Reports are filled with examples of decisions upholding Congress's Article I authority "as applied"—to particular kinds of defendants, types of conduct, or in particular factual circumstances—even where the statute on its face might have other applications that exceed Congress's authority.

Decisions under the Spending Clause are particularly illustrative. In *Sabri* v. *United States*, 541 U.S. 600 (2004), this Court rejected a facial challenge to the federal bribery statute, 18 U.S.C. § 666. In doing so, the Court emphasized that defendants challenging the scope of Congress's power to enact a criminal statute generally may not rely on the "alleg[ed] overbreadth" of the statute. *Id.* at 609. The Court explained that, on the facts before it, "the acts charged against [the defendant] him-

self were well within the limits of legitimate congressional concern." *Id.* In light of that finding, the Court concluded that the defendant's argument amounted to an improper claim "that the statute could not be enforced against him, because it could not be enforced against someone else whose behavior would be outside the scope of Congress's Article I authority to legislate"—an overbreadth challenge that should be "discouraged." *Id.*

Similarly, in *Salinas* v. *United States*, 522 U.S. 52 (1997), the Court decided whether the same statute, 18 U.S.C. § 666, was "limited to cases in which the bribe has a demonstrated effect on federal funds." *Id.* at 54. The Court held that it was not. In arriving at that conclusion, the Court rejected the theory that the constitutional avoidance canon required such a result, concluding "there is no serious doubt about the constitutionality of" the provision "as applied to the facts of th[e] case." *Id.* at 60. Canvassing the record, the Court determined that the specific conduct of the particular defendant was "a threat to the integrity and proper operation of [a] federal program." *Id.* at 61. The Court reasoned that "[w]hatever might be said about § 666(a)(1)(B)'s application in other cases, the application of § 666(a)(1)(B) to [the defendant] did not extend federal power beyond its proper bounds." *Id.*

This Court has followed a similar path in addressing claims that Congress has exceeded the scope of its powers under the Thirteenth, Fourteenth, and Fifteenth Amendments. *See, e.g.*, *Griffin* v. *Breckenridge*, 403 U.S. 88, 104-107 (1971) (holding that 42 U.S.C. § 1985 was a constitutional exercise of Congress's powers under the Thirteenth Amendment as applied to the case at hand; explaining that the Court's inquiry "need go" no further than "identifying a source of congres-

sional power to reach the private conspiracy alleged ... in this case"; and holding that the complaint alleged conduct that "Congress may reach" without a need to "trace out [the statute's] constitutionally permissible periphery"); *Tennessee* v. *Lane*, 541 U.S. 509, 530-531 (2004) (explaining, under the Fourteenth Amendment, that "nothing in our case law requires us to consider Title II [of the Americans with Disabilities Act], with its wide variety of applications, as an undifferentiated whole"; the only relevant application was that of "access to the courts"); *Raines*, 326 U.S. at 26 (applying this rule under the Fifteenth Amendment).

There is no principled basis for treating Commerce Clause challenges differently. Indeed, significant cases in the Commerce Clause canon make clear that the rule should be the same. In *Katzenbach* v. *McClung*, 379 U.S. 294, 295 (1964), for example, the Court upheld the public accommodation title of the Civil Rights Act "as applied to a restaurant" (Ollie's Barbeque). Importantly, in deciding the constitutionality of the title "as applied," the Court did not consider whether any overbreadth in the statute provided the restaurant with a defense against the title's enforcement. Similarly, in the companion case, *Heart of Atlanta Motel*, the Court held that "the action of the Congress in the adoption of [Title II] as applied ... to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause." 379 U.S. at 261. Again, the Court did not consider whether other applications of the statute might be unconstitutional or render it facially problematic.

In her brief, Petitioner points to *Lopez* and *Morrison* to argue that the absence of a jurisdictional element is a factor in considering the facial constitutionality of a statute. Pet. Br. 40. That is true, but irrelevant here.

Neither *Lopez* nor *Morrison* held that Congress must enact statutes in which the facts relevant to Congress's Article I authority are formal elements. In fact, *Sabri* teaches the opposite, explaining that it is "not generally true" that "proof of the congressional jurisdictional basis must be an element of the statute." 541 U.S. at 609; *see id.* at 605 (the Court "do[es] not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook").

To be sure, the Court in *Lopez* and *Morrison* held that the relevant statutes exceeded Congress's Article I authority as a facial matter, without considering whether the statute at issue could be applied on the particular facts of the case. But that is unsurprising where "the parties [in both cases] asserted that [the] particular statute or provision fell outside Congress' commerce power in its entirety," *Raich*, 545 U.S. at 23. Neither decision involved, as here, an as-applied challenge. The Court accordingly considered the constitutionality of the relevant statutes on their face. Indeed, the Fifth Circuit in *Lopez* had noted that the "'as applied' issue ha[d] not been briefed or argued" and therefore the court did not address it—though it observed that, "[c]onceivably, a conviction" under the statute "might be sustained if the government alleged and proved that the offense had a nexus to commerce." *United States* v. *Lopez*, 2 F.3d 1342, 1368 & n.53 (5th Cir. 1993).[13]

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[13] Although Petitioner's indictment did not allege a specific tie to interstate commerce, she has pled guilty to or admitted facts that bring her conduct squarely within Congress's Commerce Clause authority. Notably, this Court has sustained convictions even where there were no such findings or admissions, apparently based on the Court's post-trial review of the record. *See, e.g.*, *Salinas*, 522 U.S. at 60-61 (holding that there was "no serious doubt

Thus, contrary to Petitioner's assertion, neither *Lopez* nor *Morrison* stands for the remarkable proposition that a criminal defendant bringing an as-applied challenge may rely on the unconstitutionality of the statute as applied to different defendants, in separate cases, on dissimilar facts to escape punishment. For these reasons, "[w]hatever might be said" about Section 229's "application in other cases, the application" of the provision to Petitioner in the particular circumstances of this case "did not extend federal power beyond its proper bounds." *Salinas*, 522 U.S. at 61. Petitioner's as-applied challenge thus fails.

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about the constitutionality of § 666(a)(1)(B) as applied to the facts of this case" because the "preferential treatment accorded to [Salinas] was a threat to the integrity and proper operation of the federal program" without discussing whether this threat to the federal program was charged in the indictment or based on a fact found by the jury).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2013

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 12-158

In the Supreme Court of the United States

CAROL ANNE BOND, PETITIONER

v.

UNITED STATES, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF RESPONDENT

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] is respectfully filing this Brief in Support of Respondent in Case 12-158 ("*Bond*").[2] Amicus wishes to expand on the comments on *Bond* in his July 1, 2013 amicus brief, *see id.* at 11-14, supporting Petitioner in *Schuette v. BAMN*.[3]

SUMMARY OF ARGUMENT

To overturn *Missouri v. Holland*, 252 U.S. 416 (1920), or to overturn casually the Third Circuit in this case, may fly from reason, any purported "federalism", "tyranny", or other arguments notwithstanding.

ARGUMENT

Amicus is suspicious of extreme federal power, including, e.g., excessive spying on Americans. However, that does not mean all surveillance of Americans is wrong, nor that NSA employees should defect to Russia. Similarly, the specter of possible federal encroachment on States' power does not imply that the Court should geld the President or Senate, vis-à-vis treaty power or otherwise.

In *Bond*, prosecution of Ms. Bond with a chemical-weapons-related statute ("§ 229") may *arguendo*

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[1] No party or its counsel wrote or helped write this brief, or gave money to its writing or submission, *see* S. Ct. R. 37. Blanket permission to write briefs is on record with the Court.
[2] *Bond v. United States*, 681 F.3d 149 (3d Cir. 2012) (*cert. granted*, 81 U.S.L.W. 3408) (No. 12-158).
[3] 701 F.3d 466 (6th Cir. 2012) (en banc) (*cert. granted*, 81 U.S.L.W. 3539) (No. 12-682).

have been ham-handed, if not "bird-brained". However, this does not *ipso facto* imply unconstitutionality. Also, some *amici* (here unnamed) in the instant case, who protest the supposed overexpansion of federal criminal law into traditional State prerogatives, once asked this Court to uphold a partial-birth abortion act, federal criminal law, which "impinged" on States' traditional health-regulation rights. Why protest "overfederalization" now, then? So, the "sauce for the goose, sauce for the gander" principle may help uphold § 229.

And an eagle eye on *Holland*, *supra*, shows Holmes saying not, "The Government can do whatever it wants", but rather, "We do not mean to imply that there are no qualifications to the treaty-making power", *id.* at 433, and, simply, that no "invisible radiation from the general terms of the Tenth Amendment", *id.* at 434, could void the Government's treaty power. Indeed, such "radiation", *id.*, could be like a deadly poison virtually undoing the Union, creating a kind of feudal anarchy[4] whereby a State could avoid cleaning up its own mess (e.g., re birds), and ruin life for everyone.[5] (Are the birds

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[4] *See, e.g.*, Pablo Picasso's *Guernica* (1937), in which, *see id.*, the horror is not only the violence, but also the utter chaos. By contrast, *cf.*, *e.g.*, Niccolò Paganini, *Moto Perpetuo* ("Perpetual Motion"), op. 11 no.6 (1835), which, *see id.*, displays extreme energy and individualistic verve, but avoids chaos and has overarching structure. —Federal supremacy does not equal dictatorship.

[5] Since the Justice fought for the Union in the Civil War, perhaps he felt that no State should drag the Union to destruction. One can almost imagine old Holmes croaking "Nevermore!", *see* Edgar Allan Poe, *The Raven* (1845), against the sort of chaotic, evil, treacherous mess that the War helped solve.

themselves supposed to solve the problem?[6]) So, since the Constitution is no suicide pact: is that supreme Statute flexible enough to let the Government preserve order and equity by needed means?

That idea, of a "living Constitution", is live enough that there is now even an opera being written, *Scalia/Ginsburg* by Derrick Wang, about two Members of the Court and their differing opinions thereof. One former Member, sometimes known as the "Lone Ranger" for his dissents, and also known for his embrace of States' rights, also opined on the issue: *see* William H. Rehnquist, *The Notion of a Living Constitution*, 29 Harv. J. L. & Pub. Pol'y 401, 402 (1976) (citing *Holland* as one acceptable example, "with which scarcely anyone would disagree", of a "living Constitution" that can deal with present-day problems). *See also Solid Waste Agency of N. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001), where Rehnquist's opinion for the Court overturned a migratory bird rule but left *Holland* intact.[7]

So, if even Rehnquist could stomach *Holland*, one wonders why it must be overturned now. And if one tries to use that Chief Justice's *Gonzales v. Raich* (545 U.S. 1 (2005)) dissent (joining with author Justice Sandra Day O'Connor, and Justice Clarence Thomas) to argue that he would vote to overturn the

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[6] *Cf.* Aristophanes, (Ὄρνιθες ("Ornithes"), *The Birds*) (414 B.C.) (talking birds cause chaos in Olympus and on Earth); Geoffrey Chaucer, *Parliament of Fowls* (c. 1382) (verbose, contentious avians attempt self-government, with mixed results).

[7] Also, *Holland* offers 93 years of valuable precedent, despite any claims that recent legal research somehow totally, irredeemably uproots the case.

lower court in *Bond*, one should remember that there may at least be some possible positive use for marijuana, e.g., helping glaucoma victims, whereas there is no positive use for smearing 10-chlorophenoxarsine on doorknobs, as in *Bond*. (*See* the dissent in *Raich*, *supra*, on "the difficult and sensitive question [and experiment] of whether marijuana should be available to relieve severe pain and suffering". *Id.* at 43.)

Moreover, while *Engineers*, *supra*, overturned a mere regulatory rule, the statute in *Bond* was passed by the Congress itself. (If some complain that the statute impinges on States' traditional interests, such as arresting poisoners: if the statute were thus invalidated, then a terrorist could claim to be a mere poisoner and thus escape federal charges—quite an escape trick.)

Also, as for the objection that § 229 defines "chemical" without limitation, and could include harmless household items: has the Government, e.g., prosecuted every (or any) drowning as a chemical-weapons attack, since water is a chemical? ("H_2O") If not, then perhaps the Government is not so fanatical as to use the statute to implement the paraded horrible of a "federal police power".

In addition, one should not laugh off Ms. Bond's incompetence in doing serious physical damage to her victim. What if the victim had had a fatal allergy to the dangerous powder? Moreover, what if the wind blew some of the powder around the neighborhood, increasing local morbidity? The powder wasn't anthrax, but we may not want our children breathing it in, either. ...If a gunman were an absurdly poor shot and shot himself in the foot

rather than successfully massacring someone else, should he be given a free pass from criminal prosecution?

But even if the Court absolves Ms. Bond, that does not mean § 229 itself should be struck down. If some copycats to the Tsarnaev brothers use chemical weaponry to terrorize Americans at an athletic event, that statute could come in handy.

And the Government itself, frankly, often "comes in handy", despite its failures. It is extremely powerful, true—but big isn't always bad; if it were, the separate States would not have "United" into a greater entity, a Nation, in the first place. Even if the Government resembles "Big Bird" at times—often benevolent, but not always very bright—, that does not make it into Big Brother.

* * *

Speaking of "Lone Ranger", *supra*, and also the recent film, *The Lone Ranger*,[8] featuring, *inter alia*, actor Johnny Depp as Tonto, wearing a dead bird on his head, *see id.*:[9] *The New Yorker* has lampooned this honorable Court—"mercilessly", even—on its July 8 & 15, 2013 cover, portraying, *id.*, *Sesame*

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[8] Directed by Gore Verbinski (Walt Disney Productions 2013).

[9] The dead or injured bird has often served as a symbol of woe or menace: *see, e.g.*, the medieval legend of the pelican which, Christ-like, wounds itself to feed its young with its own blood; Robert Shea & Robert Anton Wilson, *The Illuminatus Trilogy* (1975), at the conclusion of which, *see id.*, insane hunter "Smiling Jim" Trepomena kills the last American eagle, and a cataclysmic earthquake immediately results; and William Shakespeare, *The Phoenix and the Turtle* (1601), which concludes, *id.*, "For these dead birds sigh a prayer." Not to mention Harper Lee's *To Kill a Mockingbird* (1960).

Street characters Bert and Ernie on a couch[10] watching a black-and-white television screen showing the 2010 official photograph of the Court's nine Members; though the photo's background is not monochrome as in real life, but somewhat rainbow-striped (variegated), like the traditional gay "rainbow flag".

On that note: if this Court goes so needlessly far as to overturn *Holland* and thus strip the Government of effective treaty-making power (and power to regulate birds), the *New Yorker*, or other medium, might once again wax imaginative . . . perhaps with a cartoon of the Court's Members sporting frightening avian hair-dos like Mr. Depp's, *supra*.[11] But the Court should not give them the chance.

CONCLUSION

Amicus respectfully asks the Court to uphold both *Holland* and as much of the court of appeals' judgment as seems reasonable; and humbly thanks the Court for its time and consideration.

August 16, 2013 Respectfully submitted,

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[10] Named "Muppets" *supra* are shown in "romantic embrace"

[11] And note all the hurt-bird-related bad omens in n.9, *supra*.

AMICUS CURIAE BRIEF

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No. 12-158

In the

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CAROL ANNE BOND, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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QUESTION PRESENTED

Can the President increase Congress's legislative power by entering into a treaty?

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TABLE OF AUTHORITIES

Cases

City of Boerne v. Flores,
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Clinton v. City of New York,
524 U.S. 417 (1998) 15-16

Crosby v. Nat'l Foreign Trade Council,
530 U.S. 363 (2000) 2

Erie R.R. Co. v. Tompkins,
304 U.S. 64 (1938) 31

De Geofroy v. Riggs,
133 U.S. 258 (1890) 20

Foster v. Neilson,
27 U.S. (2 Pet.) 253 (1829) 25

Gibbons v. Ogden,
22 U.S. (9 Wheat.) 1 (1824) 7

INS v. Chadha,
462 U.S. 919 (1983) 11, 15

Mayor of New Orleans v. United States,
35 U.S. (10 Pet.) 662 (1836) 21

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803) 4-5, 7, 12-13

Missouri v. Holland,
252 U.S. 416 (1920) ..... *passim*

Mistretta v. United States,
488 U.S. 361 (1989) 17

Newberry v. United States,
256 U.S. 232 (1921) 14

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 6,15

New York v. United States,
505 U.S. 144 (1992) 20

Patterson v. McLean Credit Union,
491 U.S. 164 (1989) 25

Payne v. Tennessee,
501 U.S. 808 (1991) 29

Printz v. United States,
521 U.S. 898 (1997) 7, 20

Reid v. Covert,
354 U.S. 1 (1957) 13,19, 21

United States v. Lara,
541 U.S. 193 (2004) 27

United States v. Lopez,
514 U.S. 549 (1995) 6, 20-21, 30-31

United States v. Morrison,
529 U.S. 598 (2000) 20-21, 30-31

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 8-9

Ware v. Hylton,
3 U.S. (3 Dall.) 274 (1796) 24

Statutes and Constitutional Provisions

Gun-Free School Zones Act,
18 U.S.C. § 922(q) 6, 31

U.S. Const. art. I, § 1 26

U.S. Const. art. I, § 8 ..... 22, 23

U.S. Const. art. I, § 8, cl. 18 8

U.S. Const. art. II, § 2 23

U.S. Const. art. II, § 2, cl. 2 ..... 12, 23

U.S. Const. art. II, § 3 8

U.S. Const. art. III, § 1 8

U.S. Const. art. III, § 2, cl. 1 ..... 9, 26

U.S. Const. art. V 12

U.S. Const. art. XIII, § 2 12

U.S. Const. art XIV, § 5 12

U.S. Const. art XIX, cl. 2 12

U.S. Const. art. XXIII § 2 12

U.S. Const. art. XXVI § 2 12

Other Authorities

Annals of Cong. (1796) 23-24

Amar, Akhil Reed, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425 (1987) 10

The Attorney General's Duty To Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55 (1980) 14

Blackstone, William, *Commentaries* 11, 24

Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, (photo. reprint 1991) (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748) 11

The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124 (1996) 17

The Declaration of Independence (U.S. 1776) 16

Eastman, John C., *Will Mrs. Bond Topple* Missouri v. Holland?, 2010-11 Cato Sup. Ct. Rev. 185 (2011) 21

Farrand, Max, *The Records of the Convention of 1787* (rev. ed.1966).....28

The Federalist (Clinton Rossiter ed., 1961) 11, 17

Golove, David M., *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1256 (2000).....18

Henkin, Louis, *Foreign Affairs and the United States Constitution* (1 st ed. 1972).....14, 27

Henkin, Louis, *Foreign Affairs and the United States Constitution* (2d ed. 1996).....16, 20, 26

Jefferson, Thomas, First Inaugural Address (Mar. 4, 1801), *in* Thomas Jefferson, *Writings* 1136-39 (Merrill D. Peterson, ed., 1984).....17

Johnson, Samuel, *A Dictionary of the English Language* (London, W. Strahan et al., 4th ed. 1773).....9

Restatement (Third) of the Foreign Relations Law of the United States (1987).....6

Rosenkranz, Nicholas Quinn, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005)2, 3-4, 28, 31

Rosenkranz, Nicholas Quinn, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209 (2010) 32

Tribe, Laurence H., *American Constitutional Law* (3d ed. 2000) 5, 12, 14, 30

Tucker, Henry St. George, *Limitations on the Treaty-Making Power* (1915) 11-12

Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty, 20 Op. Off. Legal Counsel 389, (1996) 15

Washington, George, Farewell Address (Sept. 17, 1796), *in* Presidential Documents 18, 24 (J.F. Watts & Fred L. Israel eds., 2000) 17

INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files *amicus* briefs.

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the foundational proposition that the powers of the national government are few and defined, with the residuary of sovereign authority reserved to the states or to the people. The Center and its affiliated attorneys have participated as *amicus curiae* or on behalf of parties in many cases addressing the constitutional limits on federal power.

The Atlantic Legal Foundation is a nonprofit, nonpartisan public interest law firm. It provides legal representation, without fee, to scientists, parents, educators, other individuals, small businesses, and trade associations. The Foundation's mission is to

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in any manner, and no party, party's counsel, or any person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

advance the rule of law in courts and before administrative agencies by advocating for limited and efficient government, free enterprise, individual liberty, school choice, and sound science. The Foundation's leadership includes distinguished scholars and practitioners from across the legal community. In pursuit of its mandate, the Foundation has served as counsel for distinguished public servants charged with, *inter alia*, the exercise of the foreign affairs power, including former President Gerald R. Ford; former Secretaries of State, Defense, Treasury, and Commerce; former National Security Advisors; presidential chiefs of staff; and senior members of Congress responsible for U.S. foreign policy, in *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

Amici Cato Institute and Center for Constitutional Jurisprudence filed briefs in the prior stages of this case—in its previous hearing before this Court, then before the Third Circuit on remand, and then on petition for writ of certiorari before this Court. Those briefs and this one derive largely from an article in the *Harvard Law Review*, written by *amici*'s counsel of record. *See* Nicholas Quinn Rosenkranz, *Executing The Treaty Power*, 118 Harv. L. Rev. 1867 (2005). This article was cited by the court below, *United States v. Bond*, 681 F.3d 149, 157 n.9 (3d Cir. 2012) (majority), and by Judge Ambro in concurrence, *id.* at 169 n.1, 170.

The present case concerns *amici* because it represents an opportunity to clarify that Congress's power is limited by the Constitution and may not be increased by treaty.

SUMMARY OF ARGUMENT

The court below held that the Chemical Weapons Convention increased the power of Congress, empowering it to enact 18 U.S.C. § 229. It held, in other words, that Congress is not limited to those powers enumerated in the Constitution; rather, those powers may be increased by treaty. The Third Circuit believed that it was bound to reach this conclusion by a single, conclusory sentence in *Missouri v. Holland*: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Missouri v. Holland*, 252 U.S. 416, 432 (1920).

But the Third Circuit was obviously uneasy with this conclusion: "with practically no qualifying language in *Holland* to turn to, we are bound to take at face value" that single sentence. *Bond*, 681 F.3d at 162. "[I]t may be that there is more to say about the uncompromising language used in *Holland* than we are able to say, but that very direct language demands from us a direct acknowledgement of its meaning, even if the result may be viewed as simplistic. If there is nuance that has escaped us, it is for the Supreme Court to elucidate." *Id.* at 164-65 (footnote omitted).

Judge Ambro was even more explicit in concurrence:

> I write separately to urge the Supreme Court to provide a clarifying explanation of its statement in . . . *Holland* . . . . I hope that the Supreme Court will soon flesh out "[t]he most important sentence in the most important case

> about the constitutional law of foreign affairs," and, doing so, clarify (indeed curtail) the contours of federal power to enact laws that intrude on matters so local that no drafter of the Convention contemplated their inclusion in it.

Id. at 170 (Ambro, J., concurring) (quoting Rosenkranz, *supra*, at 1868 (2005)).

That one conclusory sentence from *Holland* implies that if a treaty commits the United States to enact some legislation, then Congress automatically obtains the power to enact that legislation, even if it would otherwise lack such power. It implies, in other words, that Congress's powers are not constitutionally fixed, but rather may be expanded by treaty.

In *Holland*, Justice Holmes provided neither reasoning nor citation for this proposition. It appears in that one conclusory sentence, in a five-page opinion that is primarily devoted to a different question. And this Court has never elaborated. The most influential argument supporting this proposition appears not in the *United States Reports* but in the leading foreign affairs treatise. This argument has largely short-circuited jurisprudential debate on the question. But recent scholarship has shown that the historical premise of this academic argument is simply, demonstrably false.

The proposition that treaties can increase the power of Congress is inconsistent with the text of the Treaty Clause, the Necessary and Proper Clause, and the Tenth Amendment. It is inconsistent with the fundamental structural principle that "[t]he powers of the legislature are defined, and limited." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176

(1803). It implies, insidiously, that that the President and the Senate can increase their own power by treaty. And it implies, bizarrely, that the President alone—or a foreign government alone—can decrease Congress's power and render federal statutes unconstitutional. Finally, it creates a doubly perverse incentive: an incentive to enter into foreign entanglements simply to increase domestic legislative power.

Holland is wrong on this point and it should be overruled. This Court should hold that treaties cannot vest Congress with additional legislative power.

ARGUMENT

I. *HOLLAND* IS INCONSISTENT WITH CONSTITUTIONAL STRUCTURE

A. Congress's Legislative Power Can Be Increased Only by Constitutional Amendment, Not by Treaty

Under *Holland*, some statutes are beyond Congress's power to enact absent a treaty, but within Congress's power given a treaty. This implication runs counter to the textual and structural logic of the Constitution, because it means that Congress's powers are not constitutionally fixed. *See* 1 Laurence H. Tribe, *American Constitutional Law*, § 4-4, 645-46 (3d ed. 2000) ("By negotiating a treaty and obtaining the requisite consent of the Senate, the President . . . may endow Congress with a source of legislative authority independent of the powers enumerated in Article I."). Under *Holland*, the legislative power is not limited to the subjects enumerated in the Constitution; it can extend to all of those subjects, plus any

others that may be addressed by treaty. And according to the Restatement (Third) of the Foreign Relations Law of the United States:

> [T]he Constitution does not require that an international agreement deal only with "matters of international concern." The references in the Constitution presumably incorporate the concept of treaty and of other agreements in international law. International law *knows no limitations on the purpose or subject matter of international agreements*, other than that they may not conflict with a peremptory norm of international law. States may enter into an agreement on *any matter of concern to them*, and international law does not look behind their motives or purposes in doing so. Thus, the United States may make an agreement on *any subject suggested by its national interests* in relations with other nations.

Restatement § 302 cmt. c (emphases added) (citation omitted).

If this is so, then Congress's legislative powers are not merely *somewhat* expandable by treaty; they are expandable *virtually without limit*. The President could, for example, enter into a treaty to regulate guns near schools—and then Congress could reenact Gun Free School Zones Act, despite *United States v. Lopez*, 514 U.S. 549 (1995). Indeed, that is the tip of the iceberg. "The Commerce Clause is not a general license to regulate an individual from cradle to grave," *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2591 (2012), but under *Holland*, a treaty could be just such a license. The President might, ostensibly to foster better relations with another coun-

try, simply exchange reciprocal promises to regulate the citizenry so as to maximize the collective welfare. If *Holland* means what it seems to say, then such a treaty would confer upon Congress plenary legislative power.

That proposition is, of course, flatly inconsistent with the basic constitutional scheme of enumerated powers; it is in deep tension with the Tenth Amendment's premise of reserved powers; and it stands contradicted by countless canonical statements that Congress's powers are fixed and defined. It is axiomatic that "the Constitution[] confer[s] upon Congress . . . not all governmental powers, but only discrete, enumerated ones." *Printz v. United States*, 521 U.S. 898, 919 (1997). And, of course, "enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824). In Chief Justice Marshall's words: "[t]he powers of the legislature are *defined, and limited;* and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury*, 5 U.S. (1 Cranch) at 176 (emphasis added).

Indeed, in this very case, this Court explained: "By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power." *United States v. Bond*, 131 S. Ct. 2355, 2364 (2011). This would be no protection at all if the legislative power were readily expandable by treaty. All of these propositions, from *Marbury* to *Bond*, are flatly inconsistent with *Holland*.

B. Congress Only Possesses the "Legislative Powers Herein Granted."

The point is reinforced by the juxtaposition of the three Vesting Clauses. Article II, Section 1, provides that "*[t]he* executive Power shall be vested in a President of the United States of America," (emphasis added), and Article III, Section 1, provides that "*[t]he* judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (emphasis added). By contrast, Article I, Section 1, provides: "*All* legislative Powers *herein granted* shall be vested in a Congress of the United States." (emphases added).

There is a simple explanation for this difference in the Vesting Clauses. Congress is the first mover in the mechanism of U.S. law. It "*make[s]* . . . Laws." U.S. Const. art. I, § 8, cl. 18 (emphasis added). By contrast, the executive branch subsequently "execute[s]" the laws made by Congress, *see* U.S. Const. art. II, § 3, and the judicial branch interprets those laws. The scope of the executive and judicial power, therefore, is *contingent* on acts of Congress.

For example, the Constitution provides that the President "shall take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. By passing a new statute, Congress may expand the President's powers by giving him a new law to execute. As Justice Jackson explained, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right *plus all that Congress can delegate*." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jack-

son, J., concurring) (emphasis added). In other words, the scope of the executive power is not fixed; it is contingent on acts of Congress.

The judicial power is contingent in just the same way. Indeed, it is expressly contingent, not only on statutes but also on treaties. Article III provides that the judicial power shall "extend" to certain sorts of cases and controversies. *See* U.S. Const. art. III, § 2, cl. 1. The verb "to extend" suggests today just what it signified in 1789: stretching, enlarging. *See, e.g.*, Samuel Johnson, *A Dictionary of the English Language* (London, W. Strahan et al., 4th ed. 1773) ("To EXTEND . . . 1. *To stretch out* towards any part. . . . 5. *To enlarge;* to continue. . . . 6. To encrease in force or duration. . . . 7. To enlarge the comprehension of any position. . . . 9. To seize by a course of law." (emphases added)). And, in particular, "[t]he judicial Power shall *extend* to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, *and Treaties made, or which shall be made, under their Authority*." U.S. Const. art. III, § 2, cl. 1. (emphases added). This clause expressly provides that the scope of the judicial power may be expanded by treaty. A new (self-executing) treaty, like a new statute, can give the judiciary something new to do, thus expanding its jurisdiction. Thus, it would not have made sense to limit the federal courts to the powers "herein granted," because the scope of the judicial power may be expanded, not only by statute but also by treaty.

But, crucially, Article I has no such provision. The *legislative* power does *not* "extend . . . to Treaties made, or which shall be made." *Id.* Indeed, the legislative power does not "extend" at all. Rather, the only

legislative powers in the Constitution are those that are enumerated, those that the document says are "herein granted." The scope of the legislative power—unlike the scope of the executive and judicial powers—does not change with the passage of statutes or the ratification of treaties. The legislative power alone is fixed rather than contingent, and so it alone is limited to an enumeration of powers "herein granted."

Indeed, this structural fact—reflected in the textual dichotomy between the Vesting Clause of Article I and those of Articles II and III—coheres perfectly with the underlying theory of separation of powers. To create a tripartite government of limited powers, it is logically necessary that at least one of the branches have *fixed* powers—powers that cannot be increased by the other branches. As one would expect, that branch is Congress. Congress is the first branch of government, the first mover in American law, the fixed star of constitutional power. *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1443 n.71 (1987) ("Congress remained in many ways *primus inter pares*. Schematically, Article I precedes Articles II and III. Structurally, Congress must exercise the legislative power before the executive and judicial powers have a statute on which to act."). Congress can increase the President's power, *but the President cannot increase Congress's power in return*. If he could, the federal government as a whole would cease to be one of limited powers.

Moreover, to the extent that the jurisdiction of any branch may be increased, it is naturally left to *different* political actors to work the expansion. To entrust Congress to expand the jurisdiction of the

executive and the judiciary is consistent with the theories of Montesquieu and Madison, because Congress has no incentive to overextend the powers of the other branches at its own expense. *See* 1 William Blackstone, *Commentaries* *142 ("[W]here the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of [its] own independence, and therewith of the liberty of the subject.").

But it is quite another matter to entrust treaty-makers—the President and Senate—to expand the power of lawmakers—the President and Senate, plus the House. Here, there is no ambition to counteract ambition; here, instead, ambition is handed the keys to power. *See* Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws* bk. XI, ch. IV, at 161 (photo. reprint 1991) (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons 1914) (1748) ("[E]very man invested with power is apt to abuse it, and to carry his authority as far as it will go."); *INS v. Chadha*, 462 U.S. 919, 947 (1983) (noting "the profound conviction of the Framers that the powers conferred on Congress were the powers to be most carefully circumscribed"); *The Federalist No. 48*, at 309 (James Madison) (Clinton Rossiter ed., 1961) ("The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."); *The Federalist No. 49*, at 313-14 (James Madison) (Clinton Rossiter ed., 1961) ("[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments."). As Henry St. George Tucker III wrote in his treatise on the treaty power five years before *Holland*, "[s]uch interpretation would clothe

Congress with powers beyond the limits of the Constitution, with no limitations except the uncontrolled greed or ambition of an unlimited power." Tucker, *Limitations on the Treaty-Making Power* § 113, at 130 (1915).

C. *Holland* Enables The Circumvention of Article V.

Another way to put the point is that *Holland* permits evasion of Article V's constitutional amendment mechanism. As a general rule, the legislative power can be increased only by constitutional amendment. This expansion has happened several times. *See* U.S. Const. amend. XIII, § 2; amend. XIV, § 5; amend. XV, § 2; amend. XIX, cl. 2; amend. XXIII, § 2; amend. XXIV, § 2; amend. XXVI, § 2.

The process provided by the Constitution for its own amendment is of course far more elaborate than the process for making treaties. *Compare* U.S. Const. art. II, § 2, cl. 2, *with* U.S. Const. Art. V. But if *Holland* means what it seems to say, then treaties "may endow Congress with a source of legislative authority independent of the powers enumerated in Article I." Tribe, *supra*. In other words, the legislative power of Congress may be increased not just by constitutional amendment but also by treaty.

The Court rejected an analogous implication in *City of Boerne v. Flores*, 521 U.S. 507 (1997):

> If Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be "superior paramount law, unchangeable by ordinary means." It would be "on a level with ordinary legislative acts, and, like other acts, . . . alter-

> able when the legislature shall please to alter it." Under this approach, it is difficult to conceive of a principle that would limit congressional power. Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.

Id. at 529 (citations omitted) (quoting *Marbury*, 5 U.S. (1 Cranch) at 177).

Holland achieves under the Necessary and Proper Clause exactly what *City of Boerne* rejected under Fourteenth Amendment. Read literally, *Holland* renders the Necessary and Proper Clause expandable by the political branches with the ratification of each new treaty. It thus allows the President and Senate to work an expansion of legislative power—which "effectively circumvent[s] the difficult and detailed amendment process contained in Article V." *Id.* This cannot be right:

> It would be manifestly contrary to the objectives of those who created the Constitution, as well as those who were responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe Article VI as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment of that document in a manner not sanctioned by Article V.

Reid v. Covert, 354 U.S. 1, 17 (1957) (plurality).

D. If *Holland* Were Correct, Then the President—or a Foreign Sovereign—Could Decrease Congress's Power and Render U.S. Statutes Unconstitutional

If it is strange to think that the legislative power can be *expanded*, not only by constitutional amendment, but also by an action of the President with the consent of the Senate, it is surely stranger still to think that the legislative power may be *contracted* by the President alone. Yet this too is an implication of *Holland*.

As a general matter, "[i]f [a] statute is unconstitutional, it is unconstitutional from the start," The Attorney General's Duty To Defend and Enforce Constitutionally Objectionable Legislation, 4A Op. Off. Legal Counsel 55, 59 (1980). And, conversely, if a statute is constitutional when enacted, it generally can be *rendered* unconstitutional only by a constitutional amendment. In other words, "[a] statute . . . must be tested by powers possessed at the time of its enactment." *Newberry v. United States*, 256 U.S. 232, 254 (1921).

Holland is inconsistent with that fundamental principle. Under *Holland*, some exercises of legislative power derive their authority not from the Constitution but from specific treaties. *See* Tribe, *supra* (treaties "may endow Congress with a source of legislative authority independent of the powers enumerated in Article I."). If so, then when such treaties are terminated, their implementing statutes presumably *become* unconstitutional. *See* Louis Henkin, *Foreign Affairs and the Constitution*, 408 n.105 (1st ed. 1972) ("in principle legislation to implement a treaty might cease to be valid if the treaty lost its effect"). Such

statutes are suddenly *rendered* unconstitutional—not by constitutional amendment but by the mere abrogation of a treaty. This is paradoxical. "The peculiar circumstances of the moment may render a measure more or less wise, but cannot render it more or less constitutional." *NFIB*, 132 S. Ct. at 2579 (quoting Chief Justice John Marshall, *A Friend of the Constitution*, Alexandria Gazette, July 5, 1819, *reprinted in John Marshall's Defense of McCulloch v. Maryland* 190-191 (Gerald Gunther ed., 1969)).

And if it is strange to think of a statute *becoming* unconstitutional, surely it is stranger still to think that the President may render a statute unconstitutional *unilaterally and at his sole discretion*. Yet this is what follows from *Holland*. The Executive Branch takes the position that the President has power to abrogate treaties unilaterally. *See* Validity of Congressional-Executive Agreements That Substantially Modify the United States' Obligations Under an Existing Treaty, 20 Op. O.L.C. 389, 395 n.14 (1996). If so, then the President, by renouncing a treaty, could unilaterally render an implementing act of Congress unconstitutional.

This result is inconsistent with the basic proposition that "repeal of statutes, no less than enactment, must conform with [Article] 1." *Chadha*, 462 U.S. at 954. This Court did not hesitate to strike down a statute that "authorize[d] the President himself to effect the repeal of laws, for his own policy reasons, without observing the procedures set out in Article I, § 7." *Clinton v. City of New York*, 524 U.S. 417, 445 (1998). The reason was simple: "[t]here is no provision in the Constitution that authorizes the President . . . to repeal statutes." *Id.* at 438. Yet under

Holland, legislation that reaches beyond enumerated powers to implement treaties is, in effect, subject to a different rule. Here, in essence, the President has a unilateral power "to effect the repeal of laws, for his own policy reasons." *Id.* at 445. Whenever he chooses, he may abrogate a treaty and thus render any implementing legislation unconstitutional.

And that is not the worst of it. The President is not the only one who can terminate a treaty. Our treaty partners can likewise renounce treaties. *See* Louis Henkin, *Foreign Affairs and the United States Constitution* 204 (2d ed. 1996) ("[A treaty] is not law of the land if it . . . has been terminated or destroyed by breach (whether by the United States *or by the other party or parties*).") (emphasis added). Under *Holland*, therefore, it is not only the President who can, at his own discretion, render certain statutes unconstitutional by renouncing treaties. *Foreign governments can do this too.* Surely the Framers would have been surprised to learn that a federal statute—duly passed by both Houses of Congress and signed by the President—may, under some circumstances, be rendered unconstitutional at the discretion of, for example, the King of England. After all, ending the King's capricious control over American legislation was the very first reason given on July 4, 1776, for the Revolution. *See* The Declaration of Independence paras. 2-4 (U.S. 1776).

All these paradoxes can be resolved only if Congress's legislative power is, in fact, fixed by the Constitution and cannot be expanded by treaty.

E. Holland Creates Doubly Perverse Incentives—Incentives for More International Entanglements, Which in Turn Increase Domestic Legislative Power

The Framers were profoundly concerned about the tendency of legislative power to expand. *See The Federalist No. 48*, *supra*, at 309 ("The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex."); *The Federalist No. 49*, *supra*, at 313-14 ("[T]he tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments."); *see also* The Constitutional Separation of Powers Between the President and Congress, 20 Op. Off. Legal Counsel 124, 131 (1996) (Dellinger, Assistant Attorney General) ("Although the founders were concerned about the concentration of governmental power in any of the three branches, their primary fears were directed toward congressional self-aggrandizement." (citing *Mistretta v. United States*, 488 U.S. 361, 411 n.35 (1989))).

The Framers were also deeply wary of international entanglements. *See, e.g.*, Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *in* Writings 1136-39 (Merrill D. Peterson, ed. 1984) (calling for "peace, commerce, and honest friendship with all nations, entangling alliances with none"); George Washington, Farewell Address (Sept. 17, 1796), *in* Presidential Documents 18, 24 (J.F. Watts & Fred L. Israel eds., 2000) ("It is our policy to steer clear of permanent alliances with any portion of the foreign world.").

If the Framers feared expanding legislative power and feared international entanglements, then *Hol-*

land would have been their worst nightmare. Under *Holland*, treaty-makers—the President and Senate—are given a wish-for-more-wishes power. They can increase their own legislative power (plus that of the House). All they need is a willing head of state, anywhere on the globe, and a new entangling alliance.

This constitutes a powerfully perverse incentive for the President and Senate to enter into treaties that reach beyond enumerated powers. After all, it is they themselves (plus the House of Representatives) who will be the beneficiaries of the increased domestic legislative power. Indeed, the treaty-makers apparently succumbed to just this temptation in *Holland* itself, as even its most ardent defenders concede: "If ever the federal government could be charged with bad faith in making a treaty, this had to be the case." David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1256 (2000).

The Constitution should not be construed to create this doubly perverse incentive—an incentive to enter foreign entanglements merely to attain the desired side effect of increased domestic legislative power. The Constitution should not be interpreted to encourage this sort of bad faith.

II. *HOLLAND* IS A DOCTRINAL ANOMALY

Holland is thus inconsistent with fundamental principles of constitutional structure. But it is also anomalous, even in relation to its closest doctrinal cousins. To see the doctrinal anomaly, it is useful to restate the general question. If a non-self-executing treaty promises that Congress will do something that it otherwise lacks power to do, what happens? Can the President (with the consent of the Senate), just by making such a promise, thus empower Congress to do that thing, even if Congress lacked the power to do so the day before? In short, can the treaty increase the legislative power of Congress?

Now, it is undisputed that treaties are important. And it is undisputed that the United States should generally keep its promises. Nevertheless—and notwithstanding the "uncompromising language used in *Holland*," *Bond*, 681 F.3d at 165—*it is also undisputed that the answer to this question is generally "no."*

If, for example, the treaty promised that Petitioner would be tried without presentment or indictment of a grand jury, the treaty would *not* thereby empower Congress to authorize a violation of the Fifth Amendment. Congress lacked that power before the treaty, and the treaty cannot confer it. *Reid*, 354 U.S. at 16-17.

If the treaty promised that Petitioner would be tried by military tribunal rather than by jury, the treaty would *not* thereby empower Congress to authorize a violation of the Sixth Amendment. Congress lacked that power before the treaty, and the treaty cannot confer it. *See id.*

And this principle extends beyond the Bill of Rights. If the treaty promised a violation of Article III, Congress is *not* thereby empowered to authorize a violation of Article III. Congress lacked that power before the treaty, and the treaty cannot confer it. *See id.* at 17-18.

Indeed this principle extends beyond express constitutional prohibitions and includes constitutional structure as well. If the treaty promised "a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent," Congress is *not* thereby empowered to accomplish such things. *De Geofroy v. Riggs*, 133 U.S. 258, 267 (1890). Congress lacked that power before the treaty, and the treaty cannot confer it.

And if, despite *Printz v. United States*, 521 U.S. 898 (1997), and *New York v. United States*, 505 U.S. 144 (1992), a treaty promised that Congress would commandeer state officials or state legislatures for its execution, then—even according to *Holland*'s preeminent defender—Congress would *not* thereby be empowered to commandeer them. *See* Henkin, *supra*, at 467 n.75 (2d ed.) ("Presumably, the United States could not command state legislatures, or 'coopt' state officials by treaty."). Congress lacked that power before the treaty, and the treaty cannot confer it.

This leaves only *Holland*—the one anomalous exception to an eminently sensible rule. If a treaty promises that Congress will regulate something that is beyond its enumerated powers—guns near schools, for example, *see United States v. Lopez*, 514 U.S. 549 (1995), or violence against women, *see United States v. Morrison*, 529 U.S. 598 (2000)—then, under *Hol-*

land, Congress *would* automatically attain that new legislative power, even though, under this Court's precedents, it lacks that power today.

This cannot be right. "[N]o agreement with a foreign nation can *confer power on the Congress*, or on any other branch of Government, *which is free from the restraints of the Constitution*." *Reid*, 354 U.S. at 16 (plurality opinion) (emphasis added). And as to this, there is no basis for distinguishing enumerated powers and the Tenth Amendment from the rest of the Constitution. "Federalism," no less than the Bill of Rights, "secures the freedom of the individual." *Bond*, 131 S. Ct. at 2364.

Reid is right, and *Holland* is wrong. A treaty cannot empower Congress to violate the Fifth Amendment, or violate the Sixth Amendment, or undermine Article III, or commandeer state officials, or subvert constitutional structure. Likewise, a treaty cannot empower Congress to exceed its enumerated powers and violate the Tenth Amendment. *See* John C. Eastman, *Will Mrs. Bond Topple* Missouri v. Holland*?*, 2010-11 Cato Sup. Ct. Rev. 185, 194-202 (2011).

The Court realized this long before *Holland*, in a case that Justice Holmes failed to cite. As this Court explained in 1836: "The government of the United States . . . is one of limited powers. It can exercise authority over no subjects, except those which have been delegated to it. Congress cannot, by legislation, enlarge the federal jurisdiction, *nor can it be enlarged under the treaty-making power*." *Mayor of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 736 (1836) (emphasis added). Indeed, Justice Scalia made exactly the same point at oral argument just

last Term: "I don't think that powers that Congress does not have under the Constitution can be acquired by simply obtaining the agreement of the Senate, the President and Zimbabwe. I do not think a treaty can expand the powers of the Federal Government." Tr. of Oral Arg. at 32-33, Golan v. Holder, 132 S. Ct. 873 (2012) (No. 10-545).

At that time, less than a year ago, the Solicitor General was in "complete[] agreement." *Id.* at 33.

III. THE NECESSARY AND PROPER CLAUSE DOES NOT EXPAND WITH EACH NEW TREATY

As this Court explained when it first encountered this case, the "ultimate issue" here turns on the conjunction of the Necessary and Proper Clause and the Treaty Clause. *Bond*, 131 S. Ct. at 2367 (2011). The question is whether these two Clauses in conjunction somehow require all the anomalous results detailed above. To answer that question, it is essential to examine the text of the two clauses and determine how they fit together. Article I provides:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. Const. art. I, § 8.

The Treaty Clause provides:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.

U.S. Const. art. II, § 2, cl. 2. By echoing the word "Power," the Treaty Clause leaves no doubt: the treaty power is an "other Power[]" referred to in the Necessary and Proper Clause.

That much is implicit in *Holland*, although Justice Holmes did not quote either clause, let alone discuss how they fit together. But the conjunction of the two clauses is essential to analyzing whether a treaty may increase congressional power. Here, then, is the way that these two clauses fit together as a matter of grammar:

> The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution . . . [the President's] Power, by and with the Advice and Consent of the Senate, to make Treaties.

U.S. Const. art. I, § 8, art. II, § 2.

When the two clauses are properly conjoined, it becomes clear that the key term is the infinitive verb "to make." The power granted to Congress is emphatically not the power to make laws for carrying into execution "all treaties." Rather, what may be carried into execution is the "Power . . . *to make* Treaties."

This power would certainly extend to laws appropriating money for the negotiation of treaties. As Rep. James Hillhouse explained in 1796, "the Presi-

dent has the power of sending Ambassadors or Ministers to foreign nations to negotiate Treaties . . . [but] it is . . . clear that if no money is appropriated for that purpose, he cannot exercise the power." 5 Annals of Cong. 673-74 (1796).

But on the plain text of the conjoined clauses, the object of this necessary and proper legislation is limited to the "Power . . to *make* Treaties" in the first place. This is not the power to *implement* treaties already made.

Nor will it do to say that the phrase "make Treaties" is a term of art meaning "conclude treaties with foreign nations and then give them domestic legal effect." There is no indication that the phrase "make Treaties" ever had such a meaning. British treaties at the time of the Framing were non-self-executing, requiring an act of Parliament to create enforceable domestic law, *see, e.g., Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 274 (1796), and yet Blackstone wrote simply of "the *king's* prerogative *to make treaties,*" without any suggestion that Parliament had a role in the "mak[ing]." Blackstone, *supra*, at *249 (emphases added); *see also id.* at *243 ("[T]he king . . . may *make* what treaties . . . he pleases." (emphasis added)); *id.* at *244 ("[T]he king may *make* a treaty." (emphasis added)). Blackstone understood the difference between *making* a treaty, which the King could do, and giving it domestic legal effect, which required an act of Parliament. The "Power . . . to make Treaties" is exhausted once a treaty is ratified; implementation is something else altogether.

This Court saw that textual point clearly when construing a statute with similar language, to wit, the "right ... to make ... contracts." 42 U.S.C. § 1981

(1988) (current version at 42 U.S.C. § 1981(a) (2006). This statutory "right ... to make ... contracts" is textually and conceptually parallel to the constitutional "Power . . . to make Treaties" both because they share the key infinitive verb "to make" and because, as Chief Justice Marshall explained, a non-self-executing treaty (like the one at issue in this case) is itself in the nature of a contract. *See Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) ("[W]hen the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."). This Court explained:

> [T]he right to *make* contracts does not extend, as a matter of either logic or semantics, to conduct . . . *after* the contract relation has been established, including breach of the terms of the contract . . . . Such *postformation* conduct does not involve the right to *make* a contract, but rather implicates the *performance* of established contract obligations . . .

Patterson v. McLean Credit Union, 491 U.S. 164, 177 (1989) (emphases added). This is exactly right—and it is flatly inconsistent with *Holland*. The "Power . . . to *make* Treaties" does not extend, as a matter of logic or semantics, to the implementation of treaties already made.

The title of the present statute suffices to finish the point. "The Chemical Weapons Convention Implementation Act of 1998" *implements* a treaty; it is neither necessary nor proper to *make* any treaty.

IV. THE MOST INFLUENTIAL ARGUMENT SUPPORTING *HOLLAND* IS BASED ON A MISREADING OF CONSTITUTIONAL HISTORY

Justice Holmes set forth no arguments whatsoever for the proposition that treaties can increase Congress's legislative power. And subsequent scholars and courts have generally contented themselves with a citation to *Holland*. But one eminent scholar has presented a single substantive argument in support of this proposition, based upon the drafting history of the Constitution.

As discussed above, the legislative power, unlike the judicial power, does not expressly "extend to . . . Treaties made, or which shall be made," U.S. Const. art. III, § 2, cl. 1; indeed, the legislative power does not "extend" at all. Rather, the legislative power is limited by the Constitution to those powers that it enumerates—those that are "herein granted." U.S. Const. art. I, § 1. *See supra*, Part I-B. And the Necessary and Proper Clause—even when conjoined with the "Power ... to *make* treaties"—says nothing whatsoever about enforcing treaties already made. *See supra* Part III.

To these textual points, though, Professor Louis Henkin has an apparently devastating reply based on constitutional drafting history: *"The 'necessary and proper' clause originally contained expressly the power 'to enforce treaties' but it was stricken as superfluous."* Henkin, *supra*, at 481 n.111 (2d ed.) (emphasis added).

This is the most powerful form of argument from constitutional history, because it is so specific and

unambiguous. On this drafting history, it would certainly appear that the Necessary and Proper Clause—in its final form, without those crucial words—still subsumes the power "to enforce treaties" beyond the other enumerated powers. This argument from drafting history would appear to be a complete answer to the textual arguments above; indeed it would appear to obviate the need for textual analysis altogether.

And so, unsurprisingly, this argument has proven quite influential. (It appeared in the first edition of Henkin's treatise, *see* Louis Henkin, *Foreign Affairs and the Constitution*, 408 n.105 (1st ed. 1972), and again, a generation later, in the second edition, *see* Louis Henkin, *Foreign Affairs and the United States Constitution*, 481 n.111 (2d ed. 1996).) Indeed, when this Court invoked *Holland* nine years ago, it cited Henkin's treatise. *United States v. Lara*, 541 U.S. 193, 201 (2004). Likewise, in this very case, the Government relied on this argument to oppose a motion to dismiss certain counts of the indictment—quoting this exact drafting history as set forth by Professor Henkin. JA 31. Neither *Lara* nor the Government's brief opposing the motion to dismiss carefully parsed or conjoined the text of the Treaty Clause and the Necessary and Proper Clause, *see supra* Part III, but this is perfectly understandable. (Indeed, the phrase "necessary and proper" and the phrase "to make treaties" never appear in the same sentence in the United States Reports.) After all, any such analysis of the actual constitutional text was obviated by Henkin's ostensibly dispositive drafting history.

But Professor Henkin was wrong. As recent scholarship has demonstrated, he simply misread the

constitutional history. *The words "to enforce treaties" never appeared in any draft of the Necessary and Proper Clause.* They were never struck as superfluous from that Clause, because they never appeared in that Clause at all. The phrase "enforce treaties" was struck from the *Militia* Clause, which was apparently the source of Henkin's confusion. *See The Records of the Federal Convention of 1787*, at 323, 382 (Max Farrand ed., rev. ed. 1937). But *that* drafting history provides no support for *Holland*. *See* Rosenkranz, *supra*, at 1912-18.

In short, the leading treatise on the law of foreign affairs makes exactly one argument in support of *Holland*'s unreasoned assumption that treaties can increase the legislative power of Congress. This treatise has profoundly influenced debate on this question, and its argument from constitutional drafting history has, for decades, short-circuited any careful analysis of the actual constitutional text. But, as it turns out, the argument in the treatise is based on a historical premise that is simply, demonstrably false.

V. *HOLLAND* SHOULD NOT BE SUSTAINED ON *STARE DECISIS* GROUNDS

At first glance, *Holland* might appear to present the strongest possible case for application of *stare decisis*. It is 93 years old. It was written by Justice Holmes. And it is canonical.

But the argument for *stare decisis* is not nearly as compelling as it may first appear. The opinion may be canonical, but on the point at issue—Congress's power to legislate pursuant to treaty—it is also utterly unreasoned. The *stare decisis* force of an opinion turns, in large part, on the quality of its reasoning and diminishes substantially if it provides no reasoning at all. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991) ("[W]hen governing decisions are . . . badly reasoned, 'this Court has never felt constrained to follow precedent.'" (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944))).

Moreover, while *Holland* is 93 years old, its holding concerning legislative power pursuant to treaty has been all but irrelevant for most of that time. Again, *Holland*'s key sentence on this point is this one: "If the treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Holland*, 252 U.S. at 432. But in 93 years, this Court has *never once* quoted any part of that sentence. It can hardly be contended that there has been much reliance upon it.

The reason is clear. From 1937 to 1995, this Court did not strike down a single statute as beyond Congress's enumerated powers. Throughout the dec-

ades when the Commerce Clause power was construed to be essentially plenary, the question of expanding Congress's legislative power by treaty was almost entirely hypothetical. During those years, any legislation that Congress enacted to execute a treaty could almost certainly have also been sustained under the Commerce Clause or some other enumerated power.[2] *See* Tribe, *supra*, § 4-4, at 646 ("The importance of treaties as independent sources of congressional power has waned substantially in the years since . . . *Holland* . . . [;] the Supreme Court [in the intervening period has] so broadened the scope of Congress' constitutionally enumerated powers as to provide ample basis for most imaginable legislative enactments quite apart from the treaty power."). Only after *Lopez*, 514 U.S. 549 (1995), did *Holland*'s secondary holding, on the scope of treaty-related legislative power, recover potential practical significance. Thus, any supposed reliance of the political branches on this holding must be dated from 1995, not 1920.

Even since 1995, this Court has struck down only three statutes as beyond the enumerated powers of Congress. *See Morrison*, 529 U.S. at 627 (invalidating part of the Violence Against Women Act); *Flores*, 521 U.S. at 536 (invalidating part of the Religious

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[2] Earlier in this litigation, the government foreswore any reliance on the Commerce Clause. JA31 ("Section 229 was not enacted under the interstate commerce authority."). It seems inappropriate to allow the government to resuscitate the Commerce Clause argument at this late date. But even if the government is to be allowed to reverse course as to this argument (and confess error for the second time in this case), the proper place for it would be on remand. This Court should decide the treaty question addressed by the opinion below.

Freedom Restoration Act); *Lopez*, 514 U.S. at 567-68 (invalidating the Gun-Free School Zones Act). It can hardly be said, therefore, that the conduct of foreign affairs has been undertaken in substantial reliance on the rule that federal legislative power may be increased by treaty.

Scholars only now are discovering *Holland*'s potential for evading this Court's stated limits on congressional power. *See* Rosenkranz, *supra*, at 1871-73 & nn.19-25 (collecting articles). If the political branches should move to act on the proposals of these scholars, *that* would constitute unfortunate reliance on erroneous doctrine. But right now—while these proposals are in the law reviews and not in *Treaties in Force* or *Statutes at Large*—*Holland* may be overruled on this point without any dislocation of foreign relations or domestic law.

This Court has not hesitated to reconsider a canonical opinion when new scholarship in the *Harvard Law Review* demonstrates that the conventional historical account was simply wrong. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 72-73 n.5 (1938) (citing Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 51-52, 81-88, 108 (1923)). And this Court has not hesitated to overrule such an opinion when it becomes clear that the opinion is fundamentally inconsistent with constitutional structure. *Erie*, 304 U.S. at 77 (overruling *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842)). This is just such a case. *See* Rosenkranz, *supra*.

In short, *Holland* may be canonical, but it does not present a strong case for *stare decisis*. It was

wrongly decided on this point, and it should be overruled.

CONCLUSION

A treaty cannot confer new legislative power on Congress, and so the treaty at issue here did not empower Congress to enact 18 U.S.C. § 229.[3] The Third Circuit's judgment should be reversed.

Respectfully submitted,

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[3] It is a quirk of the pleadings that Petitioner purports to challenge the statute "as-applied." That characterization may be inapt, because the gravamen of the claim concerns the scope of *congressional* power under the Necessary and Proper Clause, which would seem to be "facial" by nature. In any case, and regardless of the vexed "facial" / "as-applied" dichotomy, the important point is that her challenge is necessarily a challenge to *legislative* action. This Court should hold that *Congress* exceeded its power (and thus violated the Tenth Amendment), by *enacting* 18 U.S.C. § 229. *See Bond*, 131 S. Ct. at 2368 (Ginsburg, J., concurring) ("[A] law beyond the power of Congress ... is no law at all. The validity of Bond's conviction depends upon whether the Constitution permits Congress to enact § 229."); *see generally* Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 Stan. L. Rev. 1209 (2010).

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AMICUS CURIAE BRIEF

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No. 12-158

In The
SUPREME COURT OF THE UNITED STATES

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

AMICUS CURIAE BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Do the Constitution's structural limits on federal authority impose any constraints on the scope of Congress's authority to enact legislation to implement a treaty?

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INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Rights is a public interest law firm based in Washington, D.C. It has a longstanding interest in issues of federalism. It litigated *United States v. Morrison*, 529 U.S. 598 (2000), and has participated in a number of other litigations, representing both *amici* and parties, concerning the proper scope of the federal government's reach under the Commerce Power and other enumerated powers. The Center for Individual Rights has an interest in this Court's interpretation of the Treaty Power here, where the government argues for an interpretation with the potential to make any constitutional limitations on federal power meaningless.

This *amicus curiae* brief outlines the serious danger to federalist principles that the government's view creates. That view could undermine this Court's repeated interpretation of our Constitution as one endowing only enumerated and limited powers on the national government.

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[1] This brief is filed with the parties' consent evidenced by petitioner's blanket consent letter filed with this Court and respondent's letter of consent filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The Constitution established a national government with limited powers, with those not granted to that government reserved to the states or the people. If the view of the Third Circuit about the scope of the Necessary and Proper Clause with respect to treaties is correct, and if (as widely assumed) there are no strong subject matter or federalist constraints on what constitutes a valid treaty, it follows that the federal government has (or might soon have) powers much broader than those identified in the Constitution.

The federal system established in the Constitution plainly precludes the possession of, or the means of acquiring, such powers by the political branches of the federal government.

Thus, the above views are wrong. As a charter of a national government that is limited for the purposes of protecting individual rights and keeping the broadest governmental functions close to the people's control, the Constitution places robust structural limits on treaties and laws implementing them.

ARGUMENT

I. THE EXPANSIONIST VIEW OF THE TREATY POWER AND THE NECESSARY AND PROPER CLAUSE WOULD ENLARGE THE FEDERAL GOVERNMENT'S JURISDICTION BEYOND ITS MANIFEST STRUCTURAL LIMITATIONS

Relying on *Missouri v. Holland*, 252 U.S. 416 (1920), the Third Circuit held in this case that if a law implementing a valid treaty has a rational relationship to that treaty, the law is within Congress's power under the Necessary and Proper Clause, even if that law would not be within Congress's authority absent the treaty. *United States v. Bond*, 681 F.3d 149, 157 (3d Cir. 2012). And this Court has held that a treaty is valid if it 1) implicates a national interest that can only be adequately addressed by concerted action with foreign powers and 2) does not violate any prohibitory words of the Constitution, including those in the Bill of Rights. *Missouri*, 252 U.S. at 433; *Reid v. Covert*, 354 U.S. 1, 15-19 (1957) (plurality opinion). It is widely asserted by legal scholars, moreover, that there are no strong subject matter limitations on the Treaty Power, *e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 390, 432-33 (1998) (describing that view as "the accepted view"), and a plurality of this Court has stated that the Tenth Amendment has no bearing on the scope of that power. *Reid*, 354 U.S. at 18. The combination of the Third Circuit's Necessary and Proper Clause holding in this case and the view that there are neither strong subject matter constraints nor federalist or Tenth Amendment limita-

tions on what constitutes a valid treaty will hereinafter be referred to as "the Expansionist View."

Several examples of existing treaties are enough to illustrate the nearness of the danger to our federalist system if the Expansionist View were adopted – and thus to illustrate the serious constitutional maldistribution of powers between the national government and the states that view entails.

A. The United Nations Convention On The Rights Of The Child

If the Expansionist View were adopted, the United Nations Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 ("CRC") would stand but one step – that of ratification – away from being the supreme law of the land (it was signed by President Clinton in 1995 but has yet to be ratified). To put it mildly, the Convention has a very broad scope. As explained in an academic study on the subject:

> By its very nature, the Convention on the Rights of the Child addresses issues unequivocally within the domain of family law or juvenile justice. Its provisions span a range of issues, including abuse, neglect, education, labor, and capital punishment. The scope of the Convention is truly grand and ambitious, and there are many occasions where its articles may overlap with state laws. The Convention, for example, includes provisions addressing family separation, reunification, and alternative placement of the child, and protects children from abuse, neglect, sexual exploitation, and exploitative child labor. The Convention also guarantees children a right

> to social security, an adequate standard of living, education, and juvenile justice (encompassing protections such as a ban on capital punishment, the deprivation of liberty, and due process). Moreover, an important general principle of the Convention is that the "best interests of the child" will be followed in "all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies."

Susan Kilbourne, *The Convention on the Rights of the Child: Federalism Issues for the United States,* 5 Geo. J. on Fighting Poverty 327, 330-331 (1998) (quoting CRC, Art. 3) (footnotes omitted).

Clearly, there would be a rational relationship between this treaty and, for example, a detailed national code of law pertaining to children, preempting wide swaths of the family law of all of the states under the Supremacy Clause and providing a uniform way of vindicating the rights of children spelled out in the treaty. Under the Expansionist View, it follows that the national government would acquire the power to enact such a code if only the treaty were ratified as non-self-executing. Yet the federal government has never been thought to have, under the current Constitution, wholesale jurisdiction over such matters, which instead are left to the states. *See, e.g., Hisquierdo v. Hisquierdo,* 439 U.S. 572, 581 (1979) (""The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United

States.'") (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)).

B. The United Nations Convention For The Elimination Of All Forms Of Discrimination Against Women

Another existing treaty that, if the Expansionist View were true, would be one step away from being the supreme law of the land is the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, which was signed by President Carter in 1980 but has yet to be ratified. As its title indicates, that treaty gives broad protections to women against discrimination of "all forms."

For example, it calls upon contracting parties to ban prostitution (Art. 6); declares that "the right to work" is "an inalienable right of all human beings" (Art. 11(1)(a)); and calls upon contracting parties to "take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise" (Art. 2(e)).

Under the Expansionist View, Article 2(e) would give jurisdiction to Congress to pass laws now beyond its power. For example, Subtitle C of the Violence Against Women Act, 42 U.S.C. § 13981, provides a right of action for gender-bias-motivated violence (a form of discrimination by a person). This Court held Subtitle C unconstitutional as applied to violence between private individuals in *United States v. Morrison*, 529 U.S. 598 (2000).

More generally, many possible laws would be rationally related to promoting the policies of this trea-

ty. For example, the federal government would acquire jurisdiction to go beyond 18 U.S.C. § 2421 (the Mann Act) and to make all prostitution a federal crime, even in state jurisdictions where it is and historically has been legal. The federal government would also have jurisdiction to require employers to give jobs to all unemployed persons, contravening this Court's ruling that Congress cannot regulate the absence of a commercial transaction. *See National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2589 (2012) ("[A nation in which] Congress use[s] its .... power to compel citizens to act as the Government would have them act .... is not the country the Framers of our Constitution envisioned."). The federal government would also have jurisdiction to enact a detailed code of law over all relations between the sexes, thus overriding state legislation (or the lack thereof) in this area. Under the plurality view in *Reid v. Covert*, such a code could not contravene the Bill of Rights, but it might include, for example, a ban on separate sporting teams for women and men, or even on such traditional courtesies extended to women by men as the opening and holding of doors.

If some of these possible laws likely would never be passed, even by a distant federal government, it is still the case that that government has never been supposed to have the power to pass them under the current Constitution. Yet under the Expansionist View this treaty would transfer just such power from the states to the national government.

C. The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171 ("ICCPR"), actually has been ratified, in relevant part as non-self-executing, by the United States, albeit under the understanding that it does not enlarge the jurisdiction of the federal government.[2]

That understanding is fortunate for our constitutional order, for the Convention establishes a plethora of rights, including ones going beyond anything in our Bill of Rights.

For example, Article 17 of the ICCPR guarantees to everyone "the protection of the law" against "unlawful attacks on his honor and reputation," a provision to which a national defamation code, overriding state defamation laws, would be rationally related. Even more broadly, Article 23 reads as follows:

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[2] U.S. Reservations, Declarations, and Understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. 8071 (1992) ("[T]he United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing"); *id.* ("[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments"); U.S. Senate Executive Report 102-23 (102d Cong., 2d Sess.) ("The proposed understanding serves to emphasize domestically that there is no intent to alter the constitutional balance of authority between the State and Federal governments or to use the provisions of the Covenant to 'federalize' matters now within the competence of the States.")

Article 23

1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2. The right of men and women of marriageable age to marry and to found a family shall be recognized.
3. No marriage shall be entered into without the free and full consent of the intending spouses.
4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

Federal legislation establishing a national code of marriage and divorce law, preempting that of the states, clearly would have a rational relationship to this Article and to the ICCPR. Yet authority over such matters in our federalist system resides in the states, not the national government. *See, e.g., Hisquierdo,* 439 U.S. at 581.

II. THE EXPANSIONIST VIEW WOULD GRANT THE FEDERAL GOVERNMENT EXTREMELY BROAD POWERS PURSUANT TO THE CHEMICAL WEAPONS CONVENTION

To be sure, the United States has not ratified two of the above treaties, and has ratified the ICCPR with the understanding that it does not expand Congress's jurisdiction. Indeed, the president and the Senate so far have largely acted so as to respect fed-

eralism limits on treaties. Peter J. Spiro, *Resurrecting* Missouri v. Holland, 73 Mo. L. Rev. 1029, 1032-33 (2008). But political actors are not to be trusted always to understand properly or to fulfill their duty to protect the structure of the very document meant to keep them in check. As Thomas Jefferson wrote, "In questions of power, let no more be heard of confidence in man, but bind him down from mischief by the chains of the Constitution." 8 *The Writings of Thomas Jefferson* 475 (P. Ford ed. 1897). *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 588 (1985) (O'Connor, J., dissenting) (noting Congress's "underdeveloped capacity for self-restraint"). And the political forces that so far have resulted in political actors' adherence to ideas of federalism when it comes to treaties may well be aligning differently than in the past. *See* Spiro, *supra*, at 1035-38 (finding it likely that the political process, in part because of foreign pressure, would not continue to protect federalism in the future; "The [reservations, understandings, and declarations] dodge worked until the rest of the world caught on to the fact that the United States was doing effectively nothing by acceding to human rights treaties.").

Indeed, the line between federalism and a national government with police power-like authority already has been crossed, if the Expansionist View holds. The treaty at issue in this case, the Chemical Weapons Convention, 32 I.L.M. 800 (1993) ("CWC"), confers staggering powers on the federal government under this view. Not only can it pass the implementing legislation at issue here, outlawing every non-terroristic assault (such as the one here) committed

with the use of chemicals, but there certainly would be a rational relationship between that treaty and all manner of regulation of chemicals, harmful or not. Such regulations could include, for example, a law establishing a national registry of all household chemicals, with harsh penalties for possessors of chemicals who fail to comply. How better to prevent chemical attacks than by keeping track of all chemicals in the country? *See* CWC, 32 I.L.M. at 804, 810. It certainly would be rational for Congress to suppose that no board or scheduling process could keep up with all the ways otherwise harmless chemicals might be combined to become dangerous, and to believe that a registry of all chemicals (without undue harm to the nation's economic development[3]) would make it easier to trace chemicals used in attacks to their source, and thus apprehend and deter offenders. It is not merely that such a registration law would be extremely intrusive, but that it is beyond question that the power to pass such a law is not one that the Framers and ratifiers of the Constitution lodged in the national government. Yet under the Expansionist View, the Chemical Weapons Convention lodges it there now.

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[3] *See* CWC, 32 I.L.M. at 810 ("The provisions of this Convention shall be implemented in a manner which avoids hampering the economic or technological development of States Parties").

CONCLUSION

This Court should set forth strong structural limits on the federal government's power either 1) to override state sovereignty by means of the treaty power or 2) to enlarge its jurisdiction in comparison with that of the states by exploiting a combination of the Treaty Power and the Necessary and Proper Clause. Accordingly, the judgment of the Third Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

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v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163. 34

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess., 1974 U.N.T.S. 45. . . . . *passim*

Annex on Implementation and Verification 6, 9

Art. I 6, 15

Art. I(1)(a) 13

Art. I(1)(b) 13, 23

Art. II(1) 7, 14, 23

Art. II(1)(a) 7, 8, 9, 17, 23

Art. II(1)(b) 7

Art. II(2) 7, 25

Art. II(3) 8

Art. II(9) 8, 17, 22, 23, 24

Cited Authorities

Page

Art. II(9)(a) 9, 18, 19, 20, 21, 24

Art. II(9)(b) 9

Art. II(9)(c) 9

Art. II(9)(d) 9, 20

Art. IV 6

Art. V 6

Art. VI 6, 9

Art. VII 12, 29, 30, 32

Art. VII(1) 6, 11, 13, 21, 35

Art. VII(1)(a) 17, 26

Art. VII(1)(c) 32

Art. XI 32

Art. XI(2)(c) 21

Preamble para. 6 6

Preamble para. 8 22

Peaceful Nuclear Explosions Treaty, U.S.-

Page

U.S.S.R., May 28, 1976, 1714 U.N.T.S. 432 19

Threshold Test Ban Treaty, U.S.-U.S.S.R., July 3, 1974, 1714 U.N.T.S. 216 19

Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 .....18, 19

Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331 .....15, 16, 20, 21, 22

OTHER AUTHORITIES

143 Cong. Rec. S1583–S1587 (daily ed. Feb. 25, 1997).....9, 31

143 Cong. Rec. S3651 (daily ed. April 24, 1997).....31

Daniel Feakes, *Keeping Peaceful Uses Peaceful: Article VI*, in *The Creation of the Organisation for the Prohibition of Chemical Weapons* 179 (Ian R. Kenyon & Daniel Feakes eds., 2007).....6, 8, 9

Frederick Kempe, *How German Firms Built Up Iraq's Arsenal*, Seattle Times, Oct. 4, 1990 28

Jean Pascal Zanders, *The Chemical Weapons*

Cited Authorities

Page

Convention and Universality: A Question of Quality over Quantity? 4 CWC Review Conf. 1 (2002) 17

Joint US-USSR Report on Progress in the Bilateral Negotiations on the Prohibition of Chemical Weapons, U.N. Doc. CD/112 (July 7, 1980), in *Report of the Committee on Disarmament*, U.N. Doc. CD/139, Appx. II, Vol. II (Aug. 9, 1980) 30

Lisa Tabassi & Robert Silvers, *Enforcement of the Chemical Weapons Convention: Investigations and Prosecutions of Offences*, Chem. Disarmament Q., Dec. 2004, at 18 ..... 27, 28

Mann stirbt ein Jahr nach Spritzenattacke, Hannoversche Allgemeine, May 10, 2012 25

Merriam-Webster's Collegiate Dictionary (11th ed. 2005) 18

Organisation for the Prohibition of Chemical Weapons, *CWC National Implementing Legislation Database*, http://www.opcw.org/our-work/national-implementation/implementing-legislation/legislation-database/. 14, 34

Organisation for the Prohibition of Chemical Weapons, *National Legislation Implementation Kit for the Chemical Weapons Convention* (Aug. 2010) 13

Cited Authorities

Page

Organisation for the Prohibition of Chemical Weapons, *OPCW Member States*, http://www.opcw.org/about-opcw/member-states/. 10

Organisation for the Prohibition of Chemical Weapons, *OPCW Non-Member States*, http://www.opcw.org/about-opcw/non-member-states/. 10

Organisation for the Prohibition of Chemical Weapons, *Plan of Action Regarding the Implementation of Article VII Obligations*, OPCW Doc. No. C-8/DEC.16 (Oct. 24, 2003) 12

Organisation for the Prohibition of Chemical Weapons, *Report to the Conference of the States Parties at Its Twelfth Session on the Status of Implementation of Article VII of the Chemical Weapons Convention as at 22 August 2007*, OPCW Doc. No. C-12/D.G.6 (Oct. 9, 2007) 15

Organisation for the Prohibition of Chemical Weapons, *Toxins: Potential Chemical Weapons from Living Organisms*, http://www.opcw.org/about-chemical-weapons/types-of-chemical-agent/toxins 26

Philip Shenon, *Declaration Lists Companies That Sold Chemicals to Iraq*, N.Y. Times, Dec. 21, 2002 28

Report of the Committee on Disarmament, U.N. Doc. A/36/27 (Sept. 23, 1981) 22

Cited Authorities

Page

Report of the Conference on Disarmament, U.N. Doc. A/42/27 (Sept. 14, 1987) 22

S. Exec. Rep. No. 104-33 (1996) 12, 17, 31, 33

UN Security Council Resolution No. 1540, UN Doc. S/RES/1540 (Apr. 28, 2004) 11

U.S. Dep't of State, *Compliance with the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Condition (10)(C) Report* (January 2013) 11

Views of the Chairman of the Ad Hoc Working Group on Chemical Weapons on Possible Compromise Wordings of the Elements of a Future Convention, U.N. Doc. CD/CW/WP.44 (Sept. 14, 1982), *in* Report of the Committee on Disarmament, U.N. Doc. CD/335, Appx. II, Vol. IV (Sept. 17, 1982) 22

W. Seth Carus, *Bioterrorism and Biocrimes* 60 (1998, rev. 2001) 25

Walter Krutzsch & Ralf Trapp, *A Commentary on the Chemical Weapons Convention* (1994) 7, 8, 23

INTEREST OF *AMICI CURIAE*

The issue in this case is whether the criminal provisions enacted by the Chemical Weapons Convention Implementation Act, 18 U.S.C. §§ 229–229F, fall within the power of Congress to carry out the obligations of the United States under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess., 1974 U.N.T.S. 45 ("Convention" or "CWC"). Any analysis of this question must begin with an understanding of the requirements of the CWC. Yet the Petitioner's brief and the briefs supporting Petitioner largely ignore those requirements.

Amici, who are listed in the Appendix to this brief, are experts in the field of international law who specialize in international arms control agreements and have extensive knowledge of the CWC.[1] Several of the *amici* are former U.S. or foreign diplomats who participated directly in the negotiation or implementation of the CWC. *Amici* respectfully submit this brief to explain the CWC's requirements in light of its text, structure and history and the shared understanding of the 189 states parties to the CWC, to explain the treaty's importance for the United States and the rest of the world, and to explain the reasons why the terms of the treaty were intentionally made expansive.

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1. Both parties have consented in writing to the filing of amicus briefs in this case. No party or counsel for a party, nor any other person other than *amici curiae* and their counsel, authored this brief in whole or in part or made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Ending the scourge of chemical weapons has long been a pressing humanitarian problem. The Chemical Weapons Convention, opened for signature in 1993, established for the first time a comprehensive prohibition on the use, development, production, stockpiling, acquisition and transfer of chemical weapons, applicable in peacetime and in war, and applicable both to the states parties and to non-state actors.

Because chemicals with commercial uses can readily be adapted to weapons use, the Convention takes a deliberately comprehensive approach. Under the Convention, *all* toxic chemicals constitute chemical weapons and must be banned for both state and non-state use unless they are possessed and used for certain enumerated purposes and in quantities consistent with those purposes. The permitted uses listed in the Convention are ones considered necessary for science, commerce, or other purposes regarded as beneficial or appropriate. The states parties did not negotiate, and would not have wanted to include, an exception allowing the use of toxic chemicals for private criminal purposes.

For the CWC's comprehensive ban to be effective, it had to be adopted with the aim of universal implementation. Currently, the Convention has been ratified by countries accounting for over 98% of the world's land mass, population, and chemical industry. The United States has been active in pushing for worldwide accession and implementation. To that end, the United States, like numerous other nations, has enacted implementing legislation coextensive with the Convention's requirements.

Bond's suggestion that the Convention's reference to "other peaceful purposes" permits all "nonwarlike" uses is inconsistent with the Convention's plain terms. An assault is not "peaceful" in any ordinary sense of the word. The context in which the phrase "other peaceful purposes" occurs—as well as the use of identical language elsewhere in the Convention and the recitals in the Convention's preamble—further demonstrates that it is intended to encompass beneficial purposes only. The history of the Convention confirms that the negotiating parties carefully considered and deliberately rejected the idea of limiting the Convention's prohibitions to warlike purposes.

The fact that Bond's crime was motivated by a desire for revenge is irrelevant. Nothing in the Convention turns on whether Bond was motivated by anger, greed, jealousy, political or religious zealotry, or any of the other complex human motives that can lead someone to commit a crime. Nor does it matter that Bond's victim suffered only minor harm; the Convention prohibits unsuccessful as well as successful uses of chemical weapons and expressly applies even to chemicals that cause only temporary incapacitation.

The fact that Bond targeted only one victim is likewise irrelevant. Nothing in the Convention limits its application to weapons of mass destruction; it prohibits targeted as well as broad-based chemical attacks. For example, the negotiators of the Convention specifically discussed the murder of a Bulgarian dissident with a poisoned umbrella in London in the 1970s as an example of a chemical weapons use that would be prohibited.

Significantly, Bond concedes that terrorism is within the scope of the CWC. But nothing in the CWC singles out terrorism; the negotiating history cites terrorism only to illustrate why private misuse of toxic chemicals could be a problem. Moreover, the ability to prosecute an individual's stockpiling of dangerous chemicals can be critical to preventing a terrorist attack even if the government cannot prove the individual's reason for stockpiling. Bond's interpretation would open the door for anyone to stockpile potential chemical weapons on the pretext that they might be needed for a violent but nonterrorist purpose or for no disclosed purpose at all.

Contrary to what Bond suggests, it is not problematic that a cabinet of household chemicals can potentially be a "weapons cache." It already is familiar U.S. law that ordinary household items can constitute "dangerous weapons" if used as such. In any event, Bond used no ordinary household chemicals; she acquired dangerous industrial chemicals for the purpose of causing harm.

Finally, reliance on the varying laws of the 50 U.S. states would be wholly inadequate to the task of implementing U.S. obligations under the CWC. The CWC requires states parties to enact criminal prohibitions that apply not only to use of chemical weapons but also development, manufacture, possession and transfer—acts that state law generally leaves unregulated. Even if all 50 states could be persuaded to enact compliant implementing legislation, the laws must apply not only within the country but to U.S. nationals located abroad. Moreover, the U.S. Congress saw uniform federal legislation as protecting legitimate commerce in chemicals and serving important national law-enforcement goals. Requiring the United

States to rely on the laws and law-enforcement officials of the 50 states to implement the CWC and other arms control treaties could negatively impact public safety. It also would severely damage the United States' ability to negotiate other important treaties serving its national interest in the future.

The Convention's comprehensive approach was designed to minimize the need for line-drawing to avoid circumvention by rogue states and private actors alike. It may reach what appear to be local acts, but it addresses a problem of global scope. Allowing judicially crafted exceptions to the CWC for perceived "local" criminal activities would undermine the Convention's effectiveness in the United States and around the world.

ARGUMENT

I. THROUGH THE CWC, THE UNITED STATES AND ITS TREATY PARTNERS CREATED A COMPREHENSIVE REGIME TO PREVENT THE USE OF CHEMICAL WEAPONS.

A. The CWC Requires a Complete Ban on Use of Chemical Weapons, Even by Private Parties.

The Chemical Weapons Convention, opened for signature in 1993 and in force since 1997, is the culmination of decades of efforts to negotiate a comprehensive ban on chemical weapons. After the horrific suffering that chemical weapons inflicted on soldiers in the trenches during World War I, ending the use of chemical weapons has been a priority of the United States and its allies and, indeed, of humankind. Iraq's use of chemical weapons

during the Iran-Iraq War in the 1980s, with appalling human consequences, brought renewed urgency to the project. The risk from chemical weapons, whether from a state like Syria or an individual armed with sarin or other dangerous substances, remains a serious global concern today.

The CWC establishes a comprehensive system under which the states parties agree, in peacetime and during war, "to exclude completely the possibility of the use of chemical weapons." CWC preamble para. 6. To achieve this goal, the CWC prohibits the use, development, production, stockpiling, acquisition and transfer of chemical weapons. CWC art. I. The CWC requires states parties to make these prohibitions effective against not only state actors but also private persons. CWC art. VII(1).

To combat the widespread proliferation of chemical weapons capabilities and control global trade in chemicals that can potentially be used as weapons, the Convention includes a verification regime, with elaborate provisions for reporting and inspection, to monitor private-sector activity. CWC Arts. IV–VI & Annex on Implementation and Verification. These provisions aim to exclude circumvention of the ban on the development and production of chemical weapons, as well as the possible diversion of legitimately produced chemicals for illicit uses. *See, e.g.*, Daniel Feakes, *Keeping Peaceful Uses Peaceful: Article VI, in The Creation of the Organisation for the Prohibition of Chemical Weapons* 179, 179–82 (Ian R. Kenyon & Daniel Feakes eds., 2007).

B. The CWC Prohibits All Use of Toxic Chemicals and Their Precursors Except for Specified Permissible Purposes.

By the nature of chemical weapons, there can be no fixed list of permissible and impermissible chemicals, because new chemicals can be developed and existing chemicals can be repurposed for weapons use. Accordingly, the approach that the United States and the other CWC negotiators took was intentionally comprehensive: the CWC defines "chemical weapons" to include all "[t]oxic chemicals and their precursors." CWC art. II(1). "Toxic chemical" also is defined broadly to include "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm ... regardless of [its] origin or of [its] method of production." CWC art. II(2).

The possibility of limiting the Convention's scope to particularly lethal chemicals was considered and deliberately rejected by the negotiators because nearly any chemical can be harmful in sufficient quantity. Walter Krutzsch & Ralf Trapp, *A Commentary on the Chemical Weapons Convention* 24 n.6 (1994). Notably, the Convention does *not* limit the definition of "chemical weapons" to "[m]unitions and devices designed to cause death or other harm through ... toxic chemicals." CWC art. II(1)(b). That is only one subpart of the definition; the definition also includes toxic chemicals and precursors themselves. CWC art. II(1)(a).

The CWC's comprehensive approach is necessary to address the "dual use" nature of potentially harmful chemicals. Because toxic chemicals can have both a

weapons use and a non-weapons use, they are easy for both states and non-state actors to get their hands on—in contrast to, for example, nuclear weapons materials like plutonium, which are difficult to obtain. In fact, most chemicals that can be weaponized originated in the chemical industry and not the military establishment. Feakes, *supra*, at 179. Zyklon B, used by the Nazis to exterminate their victims, had been a commonly used cyanide-based pesticide. *See The Zyklon B Case (In re Tesch)*, 13 I.L.R. 250 (British Military Ct. 1946). In addition, the CWC addresses precursor chemicals, which are not themselves toxic but can be used to make toxic chemicals. CWC art. II(1)(a), (3).

Under the CWC, toxic chemicals and their precursors must be banned *unless* they are developed, produced, possessed and used for purposes that fall within the definition of "Purposes Not Prohibited Under th[e] Convention." CWC art. II(1)(a), (9); *see* Krutzsch & Trapp, *supra*, at 26. Moreover, the "types and quantities" of the chemicals produced, possessed or used must be "consistent with such purposes." CWC art. II(1)(a). The CWC negotiators considered this approach necessary to avoid proliferation of chemical weapons to those who might use them improperly and to prevent the development, manufacture or stockpiling of chemical weapons under the guise of commercial activity.

To ensure that its prohibitions are effective, the Convention limits the definition of "purposes not prohibited" to certain carefully limited exceptions, consisting of those activities that the negotiating parties considered necessary for legitimate economic, scientific or domestic security purposes. For example, the Convention

recognizes that toxic chemicals have beneficial uses and accordingly permits use of toxic chemicals for "[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." CWC art. II(9)(a). But the Convention requires such uses to involve only "types and quantities" of chemicals consistent with those peaceful purposes, CWC art. II(1)(a), and subjects those uses to the Convention's rigorous verification regime. *See* CWC art. VI & Annex on Implementation and Verification. The drafters of the Convention intended to preserve the peaceful chemical industry, which participated directly in developing the verification regime. *See, e.g.*, Feakes, *supra*, at 180–87; 143 Cong. Rec. S1586 (daily ed. Feb. 25, 1997) (letter from Fred Webber, President and CEO of the Chemical Manufacturer's Association). Thus, the Convention sets forth clear and carefully considered requirements that make it possible for the chemical industry to operate lawfully.

Other "not prohibited" purposes include uses that the negotiating parties agreed were permissible in connection with defense and law enforcement. These include "purposes directly related to protection against toxic chemicals and to protection against chemical weapons," "[m]ilitary purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare," and "[l]aw enforcement including domestic riot control purposes." CWC art. II(9)(b)–(d). The exceptions were necessary to allow the military to use toxic chemicals for reasons other than their toxic properties (for example, as fuel or explosives). They also were necessary to allow the police to use chemicals in domestic law enforcement situations, such as tear gas for riot control. All other violent uses are prohibited. In

keeping with the approach of defining "not prohibited" to include only purposes considered beneficial or necessary, the governments that negotiated the Convention did not include a provision permitting use of toxic chemicals for criminal purposes.

C. Success of the CWC Depends on Universal Accession and Implementation, Including Adoption of Legislation Penalizing Use of Chemical Weapons.

The Convention establishes a regime that universally applies to all possible actors, whether states, companies, nongovernmental organizations or individuals. Given its goal of establishing a comprehensive ban on chemical weapons, the Convention's success depends on universal accession and implementation, including by states that have no history or intention of developing chemical weapons. The Convention has been remarkably successful in obtaining ratifications: to date, the parties to the Convention already represent "about 98% of the global population and landmass, as well as 98% of the worldwide chemical industry."[2]

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2. Org. for Prohibition of Chem. Weapons, *OPCW Member States*, http://www.opcw.org/about-opcw/member-states/. Only seven UN member states—Angola, Democratic People's Republic of Korea, Egypt, Israel, Myanmar, South Sudan, and Syria—are not yet parties. Org. for Prohibition of Chem. Weapons, *Non-Member States*, http://www.opcw.org/about-opcw/non-member-states/.

As noted, the CWC requires each party to the CWC to

> Prohibit natural and legal persons ... from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity....

CWC art. VII(1). Penal legislation is an essential part of the scheme of the CWC to prevent wrongful use, and universal enactment of such legislation is essential to enable the prohibition to operate globally.

Since the adoption of the Convention, the United States has advocated as a matter of its foreign policy the importance of universal penalization of wrongful development, manufacture, stockpiling and use of chemical substances. For example, in its role as a permanent member of the UN Security Council, the United States worked for the adoption of Security Council Resolution No. 1540, UN Doc. S/RES/1540 (Apr. 28, 2004), which requires all nations to fully implement their obligations under chemical, biological and nuclear weapons treaties, with a particular focus on preventing the use of such weapons by "non-State actors." The United States also unilaterally issues an annual report on countries' compliance with their CWC obligations, including their obligation to enact penal legislation.[3] At the urging of the United States, the Organisation for the Prohibition of Chemical

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3. *See* U.S. Dep't of State, *Compliance with the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Condition (10)(C) Report* (January 2013), *available at* http://www.state.gov/documents/organization/212108.pdf.

Weapons ("OPCW"), the international organization that administers the Convention, adopted an Action Plan for full implementation of Article VII obligations, which declared it "imperative" that all states parties to the CWC swiftly finalize compliant implementing legislation and establish mechanisms meant to encourage and assist with full compliance.[4]

D. Consistent with the Goal of Universal Implementation, the United States Implementing Legislation Is Coextensive with the CWC's Requirements.

The United States cared about the universal adoption of national penal legislation because, among other reasons, it creates continuity with the United States' own implementing legislation. The United States also understood that its own adoption of implementing legislation was vital to encouraging universal participation.[5] In fact, the United States' implementing legislation has served as a model for similar legislation around the world

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4. Org. for Prohibition of Chem. Weapons, *Plan of Action Regarding the Implementation of Article VII Obligations*, OPCW Doc. No. C-8/DEC.16, ¶ 11 (Oct. 24, 2003), *available at* http://www.opcw.org/index.php?eID=dam_frontend_push&docID=423.

5. *See, e.g.*, S. Exec. Rep. No. 104-33, at 28 (1996) ("a strong U.S. commitment to the enforcement of the CWC will be essential to the effectiveness of the Convention. It may, in fact, be possible to achieve a measure of both enforcement and deterrence, but only if the United States is prepared to make compliance with the CWC a major element of its foreign policy stance toward each State Party to the Convention.").

and has influenced the template for legislation that the OPCW has published.[6]

The penal provisions of the United States implementing legislation track almost verbatim the requirements of the CWC. The CWC provides that each state party shall not "develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone," or "use chemical weapons," CWC art. I(1)(a)–(b), and requires each State Party to extend this prohibition to private persons through penal legislation, CWC art. VII(1). The U.S. implementing legislation does precisely what the Convention requires, by providing:

> [I]t shall be unlawful for any person knowingly ... to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon....

18 U.S.C. § 229(a).

The definition of "chemical weapon" in the U.S. implementing legislation, 18 U.S.C. § 229F(1), is word-for-word identical to the definition in the Convention, except for immaterial differences in capitalization and punctuation:

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6. Org. for Prohibition of Chem. Weapons, *National Legislation Implementation Kit for the Chemical Weapons Convention* (Aug. 2010), *available at* http://www.opcw.org/our-work/national-implementation/implementing-legislation/models-checklists-questionnaires/.

> "Chemical Weapons" means the following, together or separately:
>
> (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes;
>
> (b) Munitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices;
>
> (c) Any equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

CWC art. II(1).

Thus, for all purposes relevant to this case, the scope of the U.S. implementing legislation is coextensive with the scope of the Convention. So too is the implementing legislation adopted by numerous other states parties to the CWC.[7] According to the OPCW, 115 states parties as

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7. *See* Org. for Prohibition of Chem. Weapons, *CWC National Implementing Legislation Database*, http://www.opcw.org/our-work/national-implementation/implementing-legislation/legislation-database/.

of 2007 had enacted legislation establishing penalties for the acts covered by Article I of the CWC.[8]

II. THE CONVENTION APPLIES TO INDIVIDUAL MALICIOUS USE OF TOXIC CHEMICALS.

"'The interpretation of a treaty, like the interpretation of a statute, begins with its text.'" *Abbott v. Abbott*, 560 U.S. 1, 130 S. Ct. 1983, 1990 (2010) (quoting *Medellín v. Texas*, 552 U.S. 491, 506 (2008)). Unlike a statute, however, a treaty is "a contract between nations," *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 253 (1984), and must be given "a meaning consistent with the shared expectations of the contracting parties," *Air France v. Saks*, 470 U.S. 392, 399 (1985). Additionally, in interpreting treaties, this Court traditionally gives "great weight" to the views of the Executive. *Abbott*, 130 S. Ct. at 1993.

Under international law, and consistent with this Court's precedents, a treaty is to be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Vienna Convention on the Law of Treaties art. 31(1), *opened for signature* May 23, 1969,

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8. Org. for Prohibition of Chem. Weapons, *Report to the Conference of the States Parties at Its Twelfth Session on the Status of Implementation of Article VII of the Chemical Weapons Convention as at 22 August 2007*, OPCW Doc. No. C-12/D.G.6, Annex at 7 (Oct. 9, 2007), *available at* http://www.opcw.org/index.php?eID=dam_frontend_push&docID=12137.

1155 U.N.T.S. 331 ("VCLT");[9] *see Air France*, 470 U.S. at 399; *Jordan v. Tashiro*, 278 U.S. 123, 127 (1928). The treaty's "context" includes the preamble and any annexes. VCLT art. 31(2). Treaty interpretation may also take into account "[a]ny subsequent practice in the application of the treaty" which establishes the parties' agreement as to how it should be interpreted. VCLT art. 31(3)(b); *see Abbott*, 130 S. Ct. at 1993–95; *El Al Israel Airlines v. Tsui Yuan Tseng*, 525 U.S. 155, 167 (1999); *Air France*, 470 U.S. at 396–97. To confirm a treaty's meaning, or to determine the meaning where it is otherwise "ambiguous or obscure," the Court may consult the treaty's "preparatory work" (*travaux préparatoires*) and consider the "circumstances of [the treaty's] conclusion." VCLT art. 32; *see El Al*, 525 U.S. at 167; *Air France*, 470 U.S. at 396–97.

In this case, the plain text, structure and context of the CWC make clear, and the *travaux* confirm, that the CWC's prohibitions reach Bond's conduct. Petitioner's contrary interpretation is inconsistent with the Convention's plain text and structure and its internationally accepted understanding.

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9. Although the United States has not ratified the VCLT, Articles 31 and 32 of the VCLT codify customary international law on treaty interpretation, as the State Department has consistently recognized. *See, e.g., Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301, 308–09 (2d Cir. 2000). Thus, the "shared expectation[ ] of the contracting parties," *Air France*, 470 U.S. at 399, is that a treaty such as the CWC will be interpreted in accordance with the VCLT.

A. The CWC Requires States Parties to Prohibit Both Governmental and Private Use of Toxic Chemicals Except for the Enumerated "Purposes Not Prohibited."

The Convention extends its central prohibition to non-state actors, including a verification regime to ensure compliance, and requires states parties to enforce that prohibition. Specifically, Article VII(1)(a) requires each state party to the Convention to "[p]rohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction ... from undertaking any activity prohibited to a State Party." In other words, as the Senate Foreign Relations Committee explained, the Convention "requires states parties to develop implementing legislation ... to make sure that private individuals and non-governmental organizations anywhere on a State Party's territory or under its jurisdiction are prohibited from the same activities as the State Party." S. Exec. Rep. No. 104-33, at 4 (1996).

Thus, whether the possession or use of toxic chemicals is "intended for purposes not prohibited under this Convention," CWC art. II(1)(a), determines whether an act must be prohibited by legislation, regardless of who committed the act. The purposes "not prohibited under this Convention" are limited to those specifically defined in the Convention as "not prohibited." CWC art. II(9). Any interpretation that dilutes this requirement would create ambiguities and weaknesses ripe for exploitation by criminals, terrorists and rogue states that seek to acquire and potentially use toxic chemicals as weapons. *See, e.g.*, Jean Pascal Zanders, *The Chemical Weapons Convention and Universality: A Question of Quality over Quantity?* 4 CWC Review Conf. 1, 26 (2002).

B. Intentionally Poisoning an Individual Is Not a Purpose That the CWC Authorizes.

Petitioner argues that poisoning her neighbor is a "purpose not prohibited by the Convention" because, she says, it falls within the exception for "[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes." CWC art. II(9)(a). Specifically, petitioner argues that poisoning one's neighbor fits under the "other peaceful purposes" item at the end of that list because, in her view, the "most natural reading" of the exception is that it permits uses of toxic chemicals so long as they are not "warlike." Pet'r Br. 53. Petitioner is wrong.

First, by the ordinary meaning of the word "peaceful," assaulting someone is not "peaceful." "Peaceful" means "devoid of violence or force."[10] That description plainly does not apply to an attempt to harm others through the use of toxic chemicals.

This use of the term "peaceful" also appears in other arms-control treaties. For example, the Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161 ("NPT"), repeatedly uses the term "peaceful purposes" to refer to nonviolent uses of nuclear energy. *Id.* arts. III(2)–

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10. *Merriam-Webster's Collegiate Dictionary* 911 (11th ed. 2005). Other senses include "PEACEABLE" (*i.e.*, "disposed to peace : not contentious or quarrelsome" or "quietly behaved"), "untroubled by conflict, agitation, or commotion : QUIET, TRANQUIL", and "of or relating to a state or time of peace." *Id.* "Peace" refers not only to an absence of war but also to the "state of security or order within a community provided for by law or custom," as in the phrase "a breach of the peace." *Id.*

(3), IV(1)–(2) & preamble paras. 7–8. The NPT contrasts "peaceful uses" of nuclear energy with "nuclear weapons or other nuclear explosive devices." *Id.* art. III(1). This contrast makes clear that the drafters of the NPT would not have considered the manufacture or use of a nuclear bomb to be "peaceful," even if its intended use was local and unconnected with actual war. Nothing in the CWC suggests any different meaning.[11]

Second, the other permitted activities listed in CWC Article II(9)(a) are incompatible with Petitioner's argument that violent or malicious uses of toxic chemicals fall within the range of permitted "peaceful" activities. Under the *ejusdem generis* rule, general terms like "other peaceful purposes" at the end of a list of specific terms "are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–15 (2001). This principle applies to treaty interpretation as well as statutory interpretation. *See, e.g., Grimm v. Iran*, 2 Iran-U.S. Cl. Trib. Rep. 78, 79 (1983). In this case, the specific terms—"[i]ndustrial, agricultural, research, medical, [or] pharmaceutical ... purposes," art. II(9)(a)—refer to nonviolent and potentially beneficial purposes. Petitioner's purpose, intentionally causing

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11. For another example, two interrelated bilateral instruments—the Threshold Test Ban Treaty, U.S.-U.S.S.R., July 3, 1974, 1714 U.N.T.S. 216 and the Peaceful Nuclear Explosions Treaty, U.S.-U.S.S.R., May 28, 1976, 1714 U.N.T.S. 432—apply separately to nuclear weapon tests and "nuclear explosions for peaceful purposes." No one would suggest that a test of a nuclear weapon could be brought under the "peaceful purposes" rubric merely by claiming the weapon was intended for violent use outside of war.

harm to another human being, is of an entirely different kind than the purposes enumerated. It therefore cannot be within the intended scope of the final, general term "other peaceful purposes."

Third, the structure of the CWC's definition of "Purposes Not Prohibited Under th[e] Convention" further demonstrates that "other peaceful purposes" is not limited to excluding "warlike" purposes but also excludes other violent purposes. The CWC permits some potentially violent uses of toxic chemicals, but it includes them as other explicit exceptions, separate from the provision on which petitioner relies.

For example, the "domestic law enforcement" exception, in Article II(9)(d), allows the use of tear gas and similar riot control agents by police. As reflected in the U.S. implementing legislation, the United States views the provision as also permitting use of toxic chemicals for capital punishment. *See* 18 U.S.C. § 229F(7)(D). The U.S. Congress also inserted a provision in the implementing legislation that the statute does not prevent the use of pepper spray or other individual self-defense devices. *Id.* § 229C. If the "other peaceful" purposes enumerated in Article II(9)(a) already encompassed all violent purposes short of war as Bond argues, then these exceptions in the treaty and statute, among others, would be wholly superfluous. This would fly in the face of the interpretive principle that all provisions of a treaty or a statute should be given practical effect. *See Air France*, 470 U.S. at 398.

Fourth, the words of Article II(9)(a) must be read in the context of the treaty as a whole. *See* VCLT art. 31(2). Where similar words appear multiple places in

the text, the words should normally be given the same interpretation in both places. *See, e.g., Wash. Metro. Transit Auth. v. Johnson*, 467 U.S. 925, 936 (1984). Here, the key phrase in CWC Article II(9)(a)—"[i]ndustrial, agricultural, research, medical, pharmaceutical or other peaceful purposes"—also appears in Article XI(2)(c), in a context that is wholly incompatible with Petitioner's interpretation of the phrase. Article XI(2)(c), in keeping with the Convention's recognition of the generally beneficial purposes of the chemical industry, prohibits parties from maintaining any agreements

> which would restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or *other peaceful purposes.*

CWC art. XI(2)(c) (emphasis added). This provision is complementary to the requirement that states must prohibit trade in chemicals for nonpermitted purposes. CWC art. VII(1).

Article XI(2)(c) obviously was not meant to *require* states to permit trade in chemicals intended for poisoning civilians and other violent acts. The only sensible reading is that those violent purposes are not within Article XI(2)(c) because they are not "peaceful purposes." There is no reason to read Article II(9)(a), which uses the exact same words, any differently.

Fifth, the Preamble to the CWC, which provides insight into the intent of the drafters, *see* VCLT art.

31(2), recites that a purpose of the CWC is to ensure that "achievements in the field of chemistry should be used exclusively for the benefit of mankind." CWC preamble, para. 8. Reading the words "other peaceful purposes" to allow malicious uses, such as poisoning one's neighbor, would be inconsistent with that purpose.

Sixth, although there is no need to resort to the *travaux préparatoires* because the CWC is unambiguous, the *travaux* confirm that the drafters of the Convention were concerned with the use of chemical weapons by criminals as well as in the context of war. A 1981 draft of the Convention permitted the use of toxic chemicals for "non-hostile" purposes,[12] a term that could be read as prohibiting only use in actual war. But in 1982, the scope of "non-hostile purposes" was limited by defining it as "industrial, agricultural, research, medical or other peaceful purposes, law-enforcement purposes or purposes directly connected with protection against chemical weapons."[13] In 1987, the term "non-hostile purposes" was dropped altogether.[14] Through this series of changes, the CWC's drafts evolved from permitting all "non-hostile" uses of toxic chemicals to permitting only the enumerated purposes now listed in Article II(9). Petitioner's approach,

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12. Report of the Committee on Disarmament, U.N. Doc. A/36/27, at 46 (Sept. 23, 1981).

13. Views of the Chairman of the Ad Hoc Working Group on Chemical Weapons on Possible Compromise Wordings of the Elements of a Future Convention, U.N. Doc. CD/CW/WP.44, at 3 (Sept. 14, 1982), *in* Report of the Committee on Disarmament, U.N. Doc. CD/335, Appx. II, Vol. IV (Sept. 17, 1982).

14. Report of the Conference on Disarmament, U.N. Doc. A/42/27, at 45 (Sept. 14, 1987).

which would construe the Convention's prohibitions as limited to warlike uses, ignores the deliberate choice to eliminate the prospect of any such reading.

C. Petitioner's Motivation and the Fact That She Targeted One Individual Are Irrelevant.

Petitioner appears to concede that the Convention reaches some private crimes, such as those committed by "terrorists," but she argues that it does not apply to "local" crimes, such as those committed for "revenge on a romantic rival." Pet'r Br. 46. In particular, Bond argues, the CWC only requires prohibition of acts that a state could engage in, and she asserts "nation-states do not poison romantic rivals." *Id.* at 47. The relevant act that the CWC prohibits, however, is "[t]o use chemical weapons." CWC art. I(1)(b). A toxic chemical is a "chemical weapon" unless it is intended for one of the purposes identified in Article II(9). *See* CWC art. II(1). The fact that Bond was out for revenge or that her victim was a "romantic rival" is irrelevant; it may explain her subjective motivation for committing the crime, but it is not an element of the crime itself.

Fundamentally, Bond's argument confuses *intent* with *motive*. The Convention states that a toxic chemical is a weapon "except where *intended* for purposes not prohibited." CWC art. II(1)(a) (emphasis added). That is, whether the actor has the *intent* to use chemicals for a prohibited purpose dictates whether or not the Convention applies. *See, e.g.*, Krutzsch & Trapp, *supra*, at 25. But the Convention says nothing about the actor's *motive*. From the standpoint of the Convention, it makes no difference whether someone who uses chemical weapons is motivated

by a desire to propagate mass terror, wipe out a business rival, eliminate a political or military leader, overthrow a government, rob a bank, extort money, promote a political agenda, oppress a minority group, hasten an apocalypse predicted by religious beliefs, exact personal revenge, or kill or harm for another reason or no reason at all. What is relevant is that Bond intended to use a toxic chemical as a weapon rather than for one of the purposes permitted by Article II(9) of the CWC.

Bond's reading of Article II(9)(a) as encompassing all non-"warlike" purposes would open the door for anyone—including foreign states, terrorist groups, criminal organizations and their proxies—to begin acquiring, manufacturing and stockpiling large quantities of chemical weapons on the pretext that they might be needed for a violent but nonmilitary purpose. The need to foreclose those kinds of loopholes is precisely why the drafters of the CWC chose the comprehensive approach that the CWC requires.

Contradicting her own argument about motive, Bond suggests that compliance with the Convention should be judged by the *effect* of her crime, arguing that her victim suffered only minor injuries.[15] Pet'r Br. 19. But the CWC bans all uses of chemical weapons regardless of result.

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15. The absence of serious injury in this case was a matter of chance. Petitioner spread potentially lethal chemicals on her neighbor's belongings on at least 24 different occasions and had stockpiled several additional pounds of the chemicals in her own garage. Had Petitioner not been arrested, she might have succeeded in seriously injuring or killing her neighbor, her neighbor's young child or others.

Indeed, the CWC specifically defines chemical weapons to include toxic chemicals that "can cause ... temporary incapacitation" as well as those that can cause permanent harm or death. CWC art. II(2).

Bond also suggests that the Convention is focused on "weapons of mass destruction" and does not apply to her because she targeted a particular victim. Pet'r Br. 56. But again Bond is inventing a limitation on the Convention that appears nowhere in the Convention itself. The Convention requires the parties to prohibit the use of chemical weapons, regardless of the number of people targeted. And in any event, Bond offers no judicially manageable test for distinguishing "mass" attacks from small-scale ones, nor could she.

Moreover, contrary to Bond's argument, governments have engaged in individual, targeted attacks using chemical weapons. For example, in a case that received widespread publicity at the time, Georgi Markov, a defector from communist Bulgaria, was killed in London in 1978 by someone wielding a ricin-loaded umbrella.[16] The Markov killing was discussed in the CWC negotiations as

16. Unfortunately, the Markov attack was not an isolated incident. The same year, Bulgarian dissident journalist Vladimir Kostov was attacked in the Paris Métro with a device similar to the one that killed Markov but survived. *See, e.g.*, W. Seth Carus, *Bioterrorism and Biocrimes* 60 (1998, rev. 2001), *available at* http://www.ndu.edu/centercounter/full_doc.pdf. Reportedly, in 2012, a man in Hanover, Germany, died almost a year after having been stabbed on the street with a mercury-filled syringe, apparently without state involvement. *See, e.g., Mann stirbt ein Jahr nach Spritzenattacke*, Hannoversche Allgemeine, May 10, 2012.

a use of chemical weapons that the CWC would prohibit, regardless of whether it was carried out by Bulgarian state actors or private individuals. The Markov killing also played a role in the decision to list ricin as an example in an annex to the Convention. The OPCW has continued to highlight the Markov attack on its website as an example of a use of ricin as a chemical weapons agent.[17] While the umbrella that killed Markov was clearly not a "weapon of mass destruction," it has been universally understood to be a "chemical weapon."

If Markov, instead of being a political dissident, had been poisoned because he had had an affair with the Bulgarian premier's wife, that motive ("romantic rivalry") would not excuse the Bulgarian communist government's decision to use a chemical weapon. As Bond apparently concedes, the prohibition does not become narrower when a private individual rather than a state actor commits the crime. Again, the CWC requires parties to the Convention to "[p]rohibit natural and legal persons ... from undertaking any activity prohibited to a State Party." CWC art. VII(1)(a).

Bond also attempts to argue that terrorism is the only private act that the CWC covers because terrorism is a "warlike" act. But as discussed at length above, *see supra* Part B, the CWC does not limit "prohibited" purposes to warlike ones. To be sure, the Convention's negotiators were concerned that chemical weapons

17. Org. for Prohibition of Chem. Weapons, *Toxins: Potential Chemical Weapons from Living Organisms*, http://www.opcw.org/about-chemical-weapons/types-of-chemical-agent/toxins. Like many chemicals, ricin is widely available and easy to produce, and a tiny amount is enough to kill an adult.

might be used by terrorists, but that concern was merely emblematic of the types of risks posed by non-state actors. Furthermore, acts of terrorism are not inherently warlike. For example, the recent, individually targeted attacks on U.S. politicians with ricin-laced letters may be terrorist attacks, and they clearly are attacks with a chemical weapon, but it would be hard to characterize them as resembling war. The Convention requires states to prohibit all use of chemical weapons by all individuals and entities, not just warlike uses or uses by terrorists. The U.S. implementing legislation strictly complies with this mandate, as discussed above. *See supra* Parts I.C, I.D.

Neither the United States nor, to our knowledge, any of its treaty partners has applied the limitations that Bond now suggests. Throughout the world, chemical weapons-related investigations and prosecutions have involved not only attempted mass terrorist attacks but also extortion attempts, attacks on individual politicians, thefts of chemicals for commercial resale, attempted killings for personal motives, and cases in which the offender's motive could not be determined. Lisa Tabassi & Robert Silvers, *Enforcement of the Chemical Weapons Convention: Investigations and Prosecutions of Offences*, Chem. Disarmament Q., Dec. 2004, at 18, 19–23, *available at* http://www.opcw.org/index.php?eID=dam_frontend_push&docID=10369.[18] The United States, too, has

18. These include, for example, a case from Turkey involving sale of mustard gas for profit, a case from Mexico involving the hijacking of a truck containing cyanide for commercial resale, cases from several countries involving the mailing of toxic chemicals to politicians, a case from the Czech Republic involving an attempt to extort money by threatening to poison hospitals with cyanide, and a case from the United Kingdom involving a suspicious purchase of large quantities of a precursor chemical for undisclosed purposes. *Id.* at 19–23.

prosecuted individuals for possessing dangerous chemicals for undisclosed purposes. *See id.* at 22 (discussing cases of William Krar and Hessam Ghane).

If the government had to prove beyond a reasonable doubt a terrorist motive, as opposed to the absence of a legitimate purpose, many of those cases could not have been prosecuted, including cases involving large stockpiles of toxic chemicals presenting a grave danger to public safety. Indeed, the absence of a comprehensive ban on possession of chemical weapons in Japan before that country implemented the CWC apparently hindered Japanese authorities from preventing the 1995 sarin attack on the Tokyo subway, which killed 12 people and injured 5,500. *See id.* at 19. Similar weaknesses in West German law prior to implementation of the CWC contributed to to the failure of the prosecution against a major supplier of chemicals weaponized by Iraq in the 1980s. *See* Philip Shenon, *Declaration Lists Companies That Sold Chemicals to Iraq*, N.Y. Times, Dec. 21, 2002; Frederick Kempe, *How German Firms Built Up Iraq's Arsenal*, Seattle Times, Oct. 4, 1990.

Bond argues that the legislation implementing the CWC, if applied to her crime, would "turn[ ] every 'kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache.'" Pet'r Br. 15 (quoting *United States v. Bond*, 681 F.3d 149, 154 n.7 (3d Cir. 2012)); *see also id.* at 8, 44. But there is nothing problematic or unfamiliar about treating common household items as "weapons" when they are used as such. For example, it is long settled and uncontroversial that under the federal assault statute, 18 U.S.C. § 113, ordinary household items like shoes, chairs, bottles and the like can be "dangerous

weapons" if used in an assault.[19] An individual's household cabinets will become a "weapons cache," Pet'r Br. 8, 15, 44, only if the individual intends to use their contents as weapons.

Moreover, Bond's argument has nothing to do with the facts of her own case. Bond, a professional biochemist, committed her crime not with ordinary household chemicals but with two dangerous industrial chemicals that she acquired specifically for their toxic properties. Bond stole one of the chemicals from her employer, a licensed chemical manufacturer. As the government notes in its brief, the chemical Bond selected was one that the U.S. military had investigated after World War II for possible use in warfare. U.S. Br. 4. Bond purchased the other chemical over the Internet from a supplier who sold it for its use in photographic laboratories. Both of these acts directly implicate the CWC's core concerns about diversion of toxic chemicals from the chemical industry to illicit uses.

Bond's conduct falls squarely within the range of acts that Article VII of the CWC requires states parties to prohibit. Because the prohibitions in the U.S. implementing legislation are coextensive with the CWC's prohibitions in all relevant respects, *see supra* Part I.D, her conduct violated the implementing legislation as well.

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19. *See, e.g., United States v. Steele*, 550 F.3d 693, 699 (8th Cir. 2008) (tennis shoes); *United States v. Riggins*, 40 F.3d 1055, 1057 (9th Cir. 1994) (belt and shoe); *United States v. Schoenborn*, 4 F.3d 1424, 1432–33 (7th Cir. 1993) (metal part from gym equipment); *United States v. Guilbert*, 692 F.2d 1340, 1343 (11th Cir. 1982) (pool cue and beer bottle); *United States v. Johnson*, 324 F.2d 264, 266 (4th Cir. 1963) (chair); *Thornton v. United States*, 268 F.2d 583, 584 (D.C. Cir. 1959) (wine bottle).

III. INTERFERING WITH U.S. ENFORCEMENT OF THE CWC IMPLEMENTING LEGISLATION WOULD UNDERMINE U.S. DOMESTIC AND FOREIGN POLICY IMPERATIVES.

The political branches of the U.S. government determined that the obligation under CWC Article VII to impose penal sanctions, including on private parties, should be implemented in the United States through federal criminal legislation. The Executive and Congress were fully aware of the breadth of the CWC, which they subjected to careful constitutional scrutiny.

During the negotiating process, the United States devoted substantial effort to ensuring that it would be able to ratify the Convention and comply with its obligations consistent with U.S. constitutional constraints. The United States did not want to produce a treaty after many years of negotiation that it could not adhere to itself. As early as 1980, the United States insisted that the draft Convention's implementation requirements take account of constitutional considerations. *See Joint US-USSR Report on Progress in the Bilateral Negotiations on the Prohibition of Chemical Weapons*, U.N. Doc. CD/112, ¶ 18 (July 7, 1980), in *Report of the Committee on Disarmament*, U.N. Doc. CD/139, Appx. II, Vol. II (Aug. 9, 1980).

In light of longstanding treaty practice, as reflected in this Court's decision in *Missouri v. Holland*, 252 U.S. 416 (1920), the United States concluded that there were no serious federalism concerns with the Chemical Weapons Convention. Rather, the United States' concerns hinged primarily on whether the Convention's mandatory

inspection requirements for industrial facilities would violate the Fourth Amendment.

In the 1990s, when the Convention was submitted to the U.S. Senate for advice and consent to ratification, the Senate Foreign Relations Committee again carefully considered its constitutionality. S. Exec. Rep. No. 104-33, at 211–12. The Convention's supporters in the Senate went to great lengths to assure that the Convention complied with the Constitution, concluding that "nothing in the convention conflicts in any way with the fourth amendment or any other provision of the U.S. Constitution." 143 Cong. Rec. S1585 (daily ed. Feb. 25, 1997) (statement of Sen. Biden); *see also id.* at S1587 (letters from Prof. Abram Chayes and Prof. Louis Henkin). On April 24, 1997, the Senate gave its advice and consent to ratification by a vote of 74 to 26. 143 Cong. Rec. S3651 (daily ed. April 24, 1997).

Compliance with the Convention specifically requires the passage of legislation with national and international reach that prohibits and prescribes penalties for violations. The Senate understood that even potential use of chemical weapons is dangerous, and the goals of the Convention can be achieved only if chemical weapons are kept out of private as well as governmental hands. *See* S. Exec. Rep. No. 104-33, at 170–71. The Senate also recognized that the Convention reached private criminal acts and embraced the Convention as a way of "provid[ing] American law enforcement officers the tools they need to ... improve the prospects for early detection and prosecution." 143 Cong. Rec. S1583 (daily ed. Feb. 25, 1997) (statement of Sen. Biden). Congress subsequently enacted the required implementing legislation, which the President signed on October 21, 1998. U.S. Br. App. 76a–145a.

Bond contends that although the treaty regime is valid, Congress should have been required to rely on state and local law to secure compliance. Reliance on a patchwork of state and local laws would have been unworkable for a number of reasons.

First, existing state laws did not uniformly or specifically prohibit all acts that must be prohibited under the Convention. For example, while assaults with chemical weapons may have been crimes under general state laws, few if any individual U.S. states had—or have today—laws that prohibit developing, manufacturing, stockpiling, acquiring or transferring chemical weapons. Yet the United States had an obligation under Article VII of the CWC to prohibit precisely those acts. Congress could not force the individual states to legislate, *see, e.g., Printz v. United States*, 521 U.S. 898 (1997), and coordinating all 50 states to enact new legislation voluntarily could take decades, if it succeeded at all. Having determined to comply with the Convention, the U.S. Congress had no workable choice but to implement the Convention through federal legislation.

Second, state laws do not ordinarily reach the conduct of U.S. citizens overseas, but the CWC specifically requires parties to the Convention to "[e]xtend" to their nationals abroad the same legislation enacted domestically. CWC art. VII(1)(c); *see* 18 U.S.C. § 229(c). Again, only the U.S. Congress was capable of acting effectively.

Third, the goal of preserving legitimate commerce in chemicals, *see* CWC art. XI, was crucial to the drafters of the Convention, to the U.S. Congress, and to the chemical

industry that supported the Convention. An industry-friendly implementation of the Convention requires a uniform regime of requirements and penalties to provide certainty to U.S. chemical companies operating in multiple U.S. states and overseas.

Finally, Congress recognized that national and international consistency in CWC implementing legislation had significant law enforcement benefits for the United States. S. Exec. Rep. No. 104-33, at 210–11. The Senate Report underscored that the CWC implementing legislation "contains the clearest, most comprehensive and internationally recognized definition of a chemical weapon available," which would facilitate early detection, prosecution and prevention, help with obtaining search warrants, and raise public awareness. *Id.* Reliance on the priorities of individual state legislators, law enforcement officers and prosecutors, who were not attuned to the challenges of implementing an effective regime abolishing chemical weapons, would make it impossible for the United States to take a coordinated approach to the national—and international—problem of preventing the diversion and misuse of dangerous chemicals by non-state actors. Uniform national legislation, backed up by national law enforcement, was considered essential. Although Bond suggests that local law enforcement should have sufficed, local police were unwilling in this case itself to devote resources to the complaints of Bond's victim. Bond was caught only when the federal authorities became involved. U.S. Br. 5–6.

Other states parties to the Convention with federal systems of government have implemented the Convention through national legislation, including Australia, Canada,

Germany, Mexico, Switzerland and others.[20] Requiring the United States to rely on the laws of the 50 states would have made it extremely difficult for the United States to negotiate and ratify the CWC, would make it impossible as a practical matter for the United States to comply fully with the CWC, and would severely hobble the ability of the United States to exert diplomatic power and influence in order to secure uniform global implementation and compliance with the CWC. Judicially created limitations on the United States' ability to implement the CWC could also adversely affect other arms control treaties, including those related to biological and nuclear weapons, that mandate adoption of domestic legislation to subject individual conduct to penal measures.[21]

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20. *See CWC National Implementing Legislation Database*, *supra*.

21. For example, like the CWC, the Biological Weapons Convention ("BWC") obligates states parties to "prohibit and prevent" the development, retention, etc., of biological weapons, which it defines as including "[m]icrobial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes." Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, *opened for signature* Apr. 10, 1972, Art. IV, 26 U.S.T. 583, 1015 U.N.T.S. 163. Accordingly, the U.S. implementing legislation for the BWC subjects to criminal penalties "[w]hoever knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin, or delivery system for use as a weapon, or knowingly assists a foreign state or any organization to do so, or attempts, threatens, or conspires to do the same." 18 U.S.C. § 175(a). Similar requirements to prevent private conduct appear in the Convention on the Physical Protection of Nuclear Material, *opened for signature* March 3, 1980, S. Exec. Doc. H, 96th Cong., 2d Sess., 1456 U.N.T.S. 101, and Congress has implemented them as well, *see* 18 U.S.C. § 831(a).

For these reasons, the power to implement non-self-executing treaties nationwide is essential if the United States is to function as a single nation in negotiating important international agreements like the CWC. *See Missouri v. Holland*, 252 U.S. at 435. Under the U.S. Constitution and this Court's precedents, that national implementation power squarely belongs to the U.S. Congress. *See id.* at 432; *Medellín*, 552 U.S. at 1368–69.

Bond argues that failure to prosecute her individual case would not bring down any international consequences on the United States. That might be true if her case were taken in isolation; after all, the Convention requires the adoption of suitable penal legislation, but it does not preclude the appropriate exercise of prosecutorial discretion in individual cases. *See* CWC art. VII(1). But judicially carving out a whole category of cases from the scope of the Convention's implementing legislation, as Bond's counsel proposes, would be another matter altogether. The strategy adopted by the CWC negotiators was to adopt broad, general prohibitions as much as possible to avoid the need for line-drawing in particular cases. The point of having an all-encompassing treaty was to minimize the existence of borderline cases and judgment calls that could lead to circumvention.

As this Court has explained, where Congress has enacted a "comprehensive legislation"—in this case, to implement a globally-agreed prohibition—the Court cannot "excise individual components" without undermining the integrity of the larger scheme. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005). The fact that any one defendant's "own impact" may be "trivial by itself" is "not a sufficient reason for removing [her] from the scope of federal regulation." *Id.* at 20 (quoting *Wickard v. Filburn*,

317 U.S. 111, 127 (1942)). If this Court were to create an unwritten exception to the Convention's implementing legislation for non-terrorists, revenge-takers or "local" criminals, then the Convention's carefully negotiated and clear-cut test, and the statute that adopts that test, will be replaced with a difficult line-drawing exercise that has no basis in the Convention or its implementing legislation. Perhaps even more damaging, allowing a judicially crafted exception in this case would open the door for parties to seek creative expansions of that exception, or wholly new exceptions, in future cases in the U.S. and abroad.

CONCLUSION

Amici curiae respectfully submit that the judgment should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX — LIST OF *AMICI CURIAE*

Dr. **Ralf Trapp** served as a member of the German delegation to the Organisation for the Prohibition of Chemical Weapons ("OPCW"), the organization established by the Chemical Weapons Convention ("CWC") to coordinate and oversee compliance globally. He subsequently served in the Secretariat of the OPCW and as Secretary of the Scientific Advisory Board of the OPCW. Together with Walter Krutzsch, Dr. Trapp authored *A Commentary on the Chemical Weapons Convention*, a leading resource on the interpretation of the CWC. He currently is an international disarmament consultant.

Former U.S. Ambassador **Donald A. Mahley** was closely involved in negotiating on behalf of the United States the CWC as well as a number of other international agreements, including the proposed Protocol to the Biological Weapons Convention, the Arms Trade Treaty, the 1989 Wyoming Memorandum of Understanding on Chemical Weapons, the 1992 Bilateral Destruction Agreement, and the Comprehensive Test Ban Treaty.

Professor **Julian Robinson** is now retired from the University of Sussex, England, after forty years conducting research and teaching on arms limitation and technology governance, principally in regard to chemical and biological weapons. He also served for many years as an advisor to the UK National Authority for the Chemical Weapons Convention.

Appendix

Former U.S. Ambassador **Thomas Graham Jr.** served as Special Representative of the President for Arms Control, Non-Proliferation and Disarmament. Ambassador Graham participated in a senior capacity in every major arms control and disarmament policy development and international negotiation in which the United States was involved from 1970 to 1997, including the development of policy and negotiating strategy for the CWC. He currently is the Chairman of Lightbridge Corporation.

Professor **Graham S. Pearson** is a Visiting Professor of International Security in the Division of Peace Studies of the University of Bradford, England. He was previously the Director-General of the Chemical and Biological Defence Establishment at Porton Down from 1984 until his retirement in 1995. He has been involved in working on chemical and biological weapons arms control for almost thirty years.

Guy Roberts was the Deputy Assistant Secretary General for Weapons of Mass Destruction Policy for the North Atlantic Treaty Organization. Before that, he was Acting Deputy Assistant Secretary of Defense responsible for developing U.S. Defense Department policies on all arms control and non-proliferation issues. While a staff officer on the Defense Department Joint Staff, Mr. Roberts participated in the Conference on Disarmament negotiations on the CWC and was responsible for reviewing legal and policy issues regarding the CWC which might have adversely impacted defense interests. He currently is an independent consultant on national security and non-proliferation issues.

Appendix

Amy E. Smithson, PhD, is a Senior Fellow at the James Martin Center for Nonproliferation Studies. Dr. Smithson is a twenty-year veteran in in-depth field research about chemical and biological weapons nonproliferation topics, including the challenges facing the implementation of the Chemical Weapons Convention. Her scholarship and practical threat-reduction recommendations have resulted in testimony before several Congressional committees.

Professor **David A. Koplow** served as Special Counsel for Arms Control to the General Counsel of the U.S. Department of Defense and as Deputy General Counsel for International Affairs at the Department of Defense, where he was involved in the implementation and interpretation of the Chemical Weapons Convention. He was previously involved in the negotiation of the CWC as a consultant to the Arms Control and Disarmament Agency. He is a professor at the Georgetown University Law Center, where he teaches and writes in the fields of international law, national security, and arms control.

Professor **Barry Kellman** is Director of the International Weapons Control Center at DePaul University College of Law. He was the Chair of the Group of Experts that prepared the *Manual for National Implementation of the Chemical Weapons Convention*. Professor Kellman testified to the Senate Foreign Relations Committee on the constitutionality of the CWC preceding consent to ratification and again on the constitutionality of the CWC implementing legislation.

Appendix

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AMICUS CURIAE BRIEF

No. 12-158

IN THE

Supreme Court of the United States

CAROL ANNE BOND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PROFESSORS SARAH H. CLEVELAND AND WILLIAM S. DODGE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S. 177 ..... 31, 34

Definitive Treaty of Peace with Great Britain, 8 Stat. 80 (1783) 11, 12

Geneva Convention (III) relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316 32

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Treaty of Amity and Commerce between their High Mightinesses the States General of the United Netherlands, and the United States of America, 8 Stat. 32 (1782) 10, 11

Treaty of Amity and Commerce Concluded between his Majesty the King of Sweden and the United States of North-America, 8 Stat. 60 (1783) 10, 11

Treaty of Peace and Friendship Between the United States of America and His Imperial Majesty the Emperor of Morocco, 8 Stat. 100 (1787) 10

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Articles of Confederation art. IX, § 1 12

William Blackstone, *Commentaries* (1769) 20

Jean-Jacques Burlamaqui, *The Principles of Natural and Politic Law* (1747) 20

The Federalist (Jacob E. Cooke ed., 1961).....17, 18

Jack L. Goldsmith, The Heritage Guide to The Constitution, Define and Punish Clause 25

Alexander Hamilton, Brief No. 2 in *Rutgers v. Waddington* (N.Y. Mayor's Court 1784)..... 21

Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. 1996) 8, 25, 29

James Iredell's Memorandum on Attorney General Edmund Randolph's Report on the Judiciary (1791) 21

Thomas Jefferson, Opinion on French Treaties (Apr. 28, 1793)..... 21

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J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 Tex. L. Rev. 843 (2007) 14, 18

Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 Nw. U. L. Rev. 1675 (2012).....8, 14, 29

TABLE OF AUTHORITIES
(continued)

Page(s)

Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830 (2006) 29

The Records of the Federal Convention of 1787 (Max Farrand ed., 1911) 15, 16, 17, 18

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Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish ... Offenses Against the Law of Nations*, 42 Wm. & Mary L. Rev. 447 (2000) 8, 14, 29

Joseph Story, *Commentaries on the Constitution of the United States* (1833) 10

E. de Vattel, The Law of Nations (1758) (Charles G. Fenwick trans., 1916) 20

James Wilson, Lectures on Law Delivered in the College of Philadelphia in the Years 1790 and 1791 22

BRIEF FOR PROFESSORS SARAH H. CLEVELAND AND WILLIAM S. DODGE AS AMICI CURIAE IN SUPPORT OF RESPONDENT

This brief is submitted on behalf of Professors Sarah H. Cleveland and William S. Dodge.[1]

INTEREST OF AMICI CURIAE

Professor Cleveland is the Louis Henkin Professor of Human and Constitutional Rights at Columbia Law School.[2] From 2009 to 2011, she served as the Counselor on International Law to the Legal Adviser at the U.S. Department of State. She is Co-Coordinating Reporter for the American Law Institute's *Restatement (Fourth) of Foreign Relations Law of the United States*, the U.S. expert Member on the Council of Europe's Venice Commission for Democracy Through Law, and a member of the Secretary of State's Advisory Committee on International Law. She has testified before Congress on a range of issues concerning international and foreign affairs law. She is co-author of Louis Henkin's casebook *Human Rights* (2d ed. 2009), and *Our International Constitution*, 31 Yale J. Int'l L. 1 (2006), among other publications.

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[1] All parties have consented to the filing of this brief. No counsel for any party has authored this brief in whole or in part, and no person other than amici or their counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

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nia, Hastings College of the Law. From 2011 to 2012, he served as the Counselor on International Law to the Legal Adviser at the U.S. Department of State. He is Co-Reporter for the American Law Institute's *Restatement (Fourth) of Foreign Relations Law of the United States* and a member of the Secretary of State's Advisory Committee on International Law. He is co-editor of *International Law in the U.S. Supreme Court: Continuity and Change* (2011), co-author of the casebook *Transnational Business Problems* (4th ed. 2008), and author of many articles on the place of international law in the U.S. legal system.

Amici have academic expertise and a strong interest in the proper interpretation of the scope of Congress's authority to assure compliance with the United States' international legal obligations. They are the co-authors of a current draft article entitled *Defining and Punishing Offenses Under Treaties*,[3] which argues, consistent with this brief, that legislation securing individual compliance with U.S. treaty obligations—like the Chemical Weapons Convention Implementation Act—is authorized by Congress's authority to "define and punish ... Offenses against the Law of Nations," U.S. Const. art. I, § 8, cl. 10.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner was convicted of violating the Chemical Weapons Convention Implementation Act (the Act), which implements the United States' obliga-

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[3] *Available at* http://ssrn.com/abstract=2310779.

tions under the Chemical Weapons Convention (the Convention). Petitioner contends that the Act is unconstitutional as applied, because Congress lacked Article I power to pass it, and because implementation of the admittedly valid treaty under these circumstances had to be left to the States. That argument is mistaken because, as the government correctly explains, the Commerce Clause, and the Treaty Power coupled with the Necessary & Proper Clause, fully authorized Congress to adopt the Act. U.S. Br. 17-55. Thus, the Court need not rely on any other constitutional authority to affirm the decision below.

But for the reasons explained below, the Act also falls within Congress's Article I authority as an exercise of Congress's power to "define and punish ... Offences against the Law of Nations," U.S. Const. art. I, § 8, cl. 10, as petitioner herself appears to acknowledge, Pet. Br. 60. Like the Treaty Power, the history and purpose of the Offenses Clause confirms that the Framers' design was specifically intended to preclude the result that petitioner seeks—*viz.*, that the States be left responsible for implementing the United States' international commitments.

While some commentators have suggested that the Offenses Clause applies only to customary international law, and not to treaties, that Clause is in fact part of an overlapping and comprehensive constitutional scheme to ensure that the United States can comply at the national level with *all* its international obligations, both treaties and custom. The Offenses Clause was a direct response to one of the

significant deficiencies of the Articles of Confederation—the States' unwillingness to discharge the Nation's international commitments, and in particular to punish individual conduct that international law condemned. Such obligations arose under both the generally recognized unwritten law of the time, and under treaties the United States had entered. In 1781, the Continental Congress accordingly adopted a resolution recommending that the States provide "punishment" for "offences against the law of nations," including specifically "infractions of treaties." In response, most States did nothing. The Offenses Clause was the Framers' answer to that fundamental failing in the prior government. Indeed, the Clause was based on the 1781 Resolution, and the Clause's history demonstrates that its purpose was to ensure that the United States could prohibit and punish *all* conduct condemned by international law. So important was this goal that the Clause is one of the only constitutional provisions that expressly authorizes Congress to impose punishment.

The only plausible counterargument to this original understanding is that members of the Founding Generation sometimes spoke of the "law of nations" as distinct from treaties. But that argument does not overcome the overwhelming evidence that the Clause was understood to apply to treaties as well as to unwritten law. Moreover, the predominant view of influential treatise writers (including Blackstone and Vattel), members of the Founding Generation, and this Court's early opinions was that the "law of nations" as a legal concept referred to *all* international law.

This Court has confirmed that the purpose of the Offenses Clause is to further the United States' "vital national interest in complying with international law," *Boos v. Barry*, 485 U.S. 312, 323 (1988), and has recognized that the Clause authorizes Congress not only to prohibit conduct that itself violates international law, but also conduct that the United States has an international obligation to prohibit, *United States v. Arjona*, 120 U.S. 479, 488 (1887). This purpose applies to "*all* violations by the United States of their international obligations." *Id.* at 483 (emphasis added). Moreover, several of this Court's cases have expressly recognized that Offenses Clause legislation can include enforcement of treaties. Indeed, there is no plausible reason why the Offenses Clause should bestow plenary authority to punish violations of customary international law, but not treaties. And while treaties have always been an important source of international law, their significance—and thus the need for the United States to ensure compliance—has only increased over time.

Congress has historically relied on the Offenses Clause to authorize legislation implementing treaties. The Act at issue here did not cite the Offenses Clause as authority, but express reliance is not required to uphold the constitutionality of a statute. Because the Act prohibits conduct that the Convention obligates the United States to punish, it falls squarely within Congress's Offenses Clause authority.

The legislation in this case is fully supported by the Commerce Clause and the Treaty and Necessary

& Proper Clauses. These powers were similarly intended to ensure that the United States could secure compliance with treaties at the national level. The Offenses Clause confirms this core purpose of the constitutional design. Petitioner argues that the "federal government may step into the State's traditional criminal realm only when it targets conduct that implicates matters of national or international, not just local, concern." Pet. Br. 22. But the history of the Offenses Clause shows that fulfilling the United States' international obligations is *always* a matter of national concern. Indeed, if the Offenses Clause did *not* authorize the Act, that would be all the more reason for the Court to conclude that the Treaty Power and Necessary & Proper Clause must authorize it, for the constitutional design makes clear that the National Government must be responsible for implementing our treaty commitments. Adopting petitioner's argument, by contrast, would return responsibility for ensuring U.S. compliance with some international obligations to the States—and thus undo one of the principal accomplishments of the Summer of 1787.

ARGUMENT

I. THE OFFENSES CLAUSE IS PART OF A COMPREHENSIVE CONSTITUTIONAL SCHEME TO ENSURE THAT THE UNITED STATES CAN COMPLY WITH ITS INTERNATIONAL OBLIGATIONS, INCLUDING TREATIES

Through various provisions, including the Offenses Clause, the United States "are vested by the Constitution with the entire control of international

relations, and with all the powers of government necessary to maintain that control, and to make it effective." *Fong Yue Ting v. United States*, 149 U.S. 698, 711-12 (1893); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 427 n.25 (1964). "Every part of that instrument shows that our whole foreign intercourse was intended to be committed to the hands of the general government." *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 575 (1840).

Thus, for example, the Constitution gives Congress the power, among other things, "[t]o regulate Commerce with foreign Nations," U.S. Const. art. I, § 8, cl. 3, and "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States," *id.* art. I, § 8, cl. 18. It gives the President the "Power ... to make Treaties, provided two thirds of the Senators present concur," *id.* art. II, § 2, cl. 2, and the duty to "take Care that the Laws be faithfully executed," *id.* art. II, § 3. It grants the federal judiciary jurisdiction over all cases arising under treaties, as well as an array of specific controversies likely to raise foreign relations concerns. *Id.* art. III, § 2. It provides that "all Treaties ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby." *Id.* art. VI, § 2. And it expressly forbids the States from exercising a range of foreign relations powers, including to "enter into any Treaty." *Id.* art. I, § 10, cl. 1.

Congress's authority to "define and punish ... Offences against the Law of Nations" is an integral part of this constitutional scheme. U.S. Const. art. I,

§ 8, cl. 10. As explained in detail below, the purpose of the Offenses Clause is to ensure that the United States can comply with its international obligations by prohibiting individual conduct condemned by international law. While commentators have disagreed about whether the Clause applies to treaties,[4] the history and purpose of the Clause demonstrate that it authorizes Congress to implement *all* U.S. international law obligations.

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[4] Louis Henkin concluded that the Offenses Clause applies to treaties and "enable[s] Congress to enforce by criminal penalties any new international obligation the United States might accept." *Foreign Affairs and the United States Constitution* 69-70 (2d ed. 1996). *But see, e.g.*, Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution's Law of Nations Clause*, 106 Nw. U. L. Rev. 1675, 1689 n.58 (2012) ("The Treaty and Offenses Clauses separately address the two primary sources of international law. This dichotomy suggests that the Offenses Clause becomes relevant only when the United States is not party to a treaty that would authorize the relevant legislation."); Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish ... Offenses Against the Law of Nations*, 42 Wm. & Mary L. Rev. 447, 482 (2000) ("Given that treaties are otherwise covered by the Constitution, it is likely that the Offenses Clause primarily addresses violations of customary international law.").

A. The History And Original Understanding Of The Offenses Clause Demonstrates That It Was Intended To Authorize Congress To Enforce All U.S. International Obligations Against Individuals

The purpose of the Offenses Clause is fully evident in the detailed history described below. But a short description of the context in which it was adopted demonstrates that purpose and why it applies to *all* U.S. international obligations, both customary and treaty-based.

The Framers had lived through a decade under the Articles of Confederation. They realized that the United States could not live up to its international obligations under the Articles, which left enforcement of those obligations to unwilling States. Individual infractions of U.S. international law obligations, including treaties, and the inability of the United States to punish those infractions at the national level, were a source of acute concern. Indeed, so important was this concern that in addition to creating the general Treaty Power, the Framers established a complementary power to punish international law offenses—one of the only explicit powers to punish that appears in the Constitution. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 416-17 (1819). The Offenses Clause thus was part of the solution to the precise problem that petitioner would now resurrect: requiring the Nation to rely on the individual States to comply with international law.

That is how Justice Story, in his seminal treatise, understood the Offenses Clause:

> As the United States are responsible to foreign governments for all violations of the law of nations, and as the welfare of the Union is essentially connected with the conduct of our citizens in regard to foreign nationals, congress ought to possess the power to define and punish all such offenses, which may interrupt our intercourse and harmony with, and our duties to them.

3 Joseph Story, *Commentaries on the Constitution of the United States* § 1160 (1833); *see also Boos v. Barry*, 485 U.S. 312, 323 (1988) (Offenses Clause furthers the "vital national interest in complying with international law"); *United States v. Arjona*, 120 U.S. 479, 483 (1887) (Constitution gives Congress authority under the Offenses Clause because the National Government is "responsible to foreign nations for all violations by the United States of their international obligations"). As the Framers understood, that purpose applies equally to unwritten and treaty-based obligations.

1. a. The rights and duties of the newly independent United States under the law of nations were a major preoccupation under the Articles of Confederation. The first treaties the United States entered after independence were with France: a Treaty of Alliance (8 Stat. 6 (1778)) and a Treaty of Amity and Commerce (8 Stat. 12 (1778)). Over the next decade, the United States entered similar treaties with other nations. *See* 8 Stat. 32 (1782) (Netherlands); 8 Stat. 60 (1783) (Sweden); 8 Stat. 84 (1785) (Prussia); 8 Stat. 100 (1787) (Morocco). And in 1783, the United

States ratified the Definitive Treaty of Peace with Great Britain, in which Britain acknowledged U.S. independence. 8 Stat. 80 (1783). The Continental Congress was very concerned about the States' repeated violation of these treaty obligations, and in 1786, John Jay prepared a report for Congress detailing such violations. 31 *Journals of the Continental Congress 1774-1779*, at 781-874 (Gaillard Hunt ed., 1912).

But while violations of treaties by the States were important—and ultimately led to the establishment of a comprehensive national power to enforce treaties vis-à-vis the States, *e.g.*, U.S. Const. art. II, § 2, cl. 2; art. VI, § 2—so too was the States' unwillingness to punish individual infractions of international law, including treaties. A number of U.S. treaties proscribed individual conduct. For example, the 1778 Treaty of Amity with France included limitations on fishing (8 Stat. at 16), on the conduct of privateers (*id.* at 22),[5] and on taking of commissions or letters of marque to act as privateers against the other side (*id.* at 24),[6] as well as a provision requiring safe conduct for merchants of the other party in the event of war (*id.*).[7] Early U.S. treaties also pledged peace not just between the United States and the other state, but between their respec-

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[5] *See also* 8 Stat. at 40 (Netherlands); 8 Stat. at 68-70 (Sweden).

[6] *See also* 8 Stat. at 44 (Netherlands); 8 Stat. at 74 (Sweden); 8 Stat. at 94 (Prussia).

[7] *See also* 8 Stat. at 42 (Netherlands); 8 Stat. at 72-74 (Sweden); 8 Stat. 94-96 (Prussia).

tive inhabitants. *See, e.g.*, Definitive Treaty of Peace with Great Britain, *supra*, art. VII. During the 1790s, individuals would be prosecuted by the Washington Administration for violating these neutrality provisions. *See, e.g.*, *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793); *see infra* at 29-30.

b. Violations of international law by individuals soon became a serious concern, but the Continental Congress only had authority to deal with piracy. Articles of Confederation art. IX, § 1, cl. 6. The nation otherwise depended upon the States to punish individual infractions of treaties and unwritten international law. In 1781, a committee reported to Congress "[t]hat the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations." 21 *Journals of the Continental Congress*, *supra*, at 1136. Congress then adopted a resolution recommending "to the legislatures of the several states to provide expeditious, exemplary and adequate punishment" for violations of safe-conducts "expressly granted under the authority of Congress," the neutrality of states "in amity, league, or truce with the United States," "the immunities of ambassadors ... authorized ... by the United States," and "infractions of treaties and conventions to which the United States are a party." *Id.* at 1136-37[8]; *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 716, 721-23 (2004) (discussing 1781 Resolution).

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[8] The full text of the 1781 Resolution is reproduced in an appendix to this brief.

This 1781 Resolution and the committee report on which it was based are especially important here for two reasons. *First*, these documents demonstrate an important textual point: in this context—when the question was what conduct should be proscribed consistent with the United States' international obligations—the "law of nations" was understood to include treaties. The committee report believed that the States did not adequately punish "offences against the law of nations." Congress responded by recommending that the States punish not just specified violations,[9] but also "infractions of treaties and conventions to which the United States are a party." 21 *Journals of the Continental Congress*, *supra*, at 1136-37. The next two sentences of the Resolution confirm the point. The first describes "*[t]he preceding*" offenses—i.e., violations of safe-conducts, breaches of neutrality, infractions of the rights of ambassadors, *and violations of treaties*—as "being only those offences against the law of nations which are most obvious." *Id.* at 1137 (emphasis added). The second sentence recommends that the States appoint tribunals "to decide on offences against the law of nations, not contained in the foregoing enumeration." *Id.* "[I]nfractions of treaties," in other words, were understood to be "offences against the

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[9] At least two of the Resolution's references to specific violations of the law of nations would also have incorporated existing treaties. The 1778 Treaty of Amity with France pledged peace between the parties and their inhabitants, 8 Stat. at 14 (art. 1), and promised safe-conducts for merchants in the event of war, 8 Stat. at 24 (art. 20).

law of nations" that were "contained in the foregoing enumeration."

Second, the 1781 Resolution is crucial to understanding the Offenses Clause because the Clause originated in, and was intended to address the failings identified by, the Resolution. The 1781 Resolution discussed the need "to provide ... punishment" for "offences against the law of nations," and is thus generally acknowledged as the forerunner of the Offenses Clause. *See, e.g.*, Kontorovich, *supra*, at 1694 (2012); Stephens, *supra*, at 469. Edmund Randolph, who would play a key role in drafting the Offenses Clause, authored the 1781 Resolution. *See* 21 *Journals of the Continental Congress*, *supra*, at 1137 n.1. That the Resolution identified the States' failure to prohibit violations of both unwritten international law and treaties as a problem, and expressly contemplated punishing violations of treaties as "offences against the law of nations," strongly suggests that the Offenses Clause of the Constitution should be understood to do the same.

All states but Connecticut and South Carolina ignored the Resolution. *See* J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 Tex. L. Rev. 843, 881 n.180 (2007). In 1785, after the Marbois incident in which a French diplomat was assaulted in Philadelphia, the Continental Congress reiterated the concern, directing the U.S. Secretary for Foreign Affairs John Jay to draft "an act to be recommended to the legislatures of the respective states, for punishing the infractions of the laws of nations, and more especially for securing the privi-

leges and immunities of public ministers from foreign powers," 29 *Journals of the Continental Congress*, *supra*, at 655.

2. The drafting history of the Offenses Clause confirms that the Framers understood the Clause to encompass treaties. The Nation's ability to punish offenses against the law of nations, including treaties, was very much on the delegates' minds at the Constitutional Convention. Edmund Randolph, drafter of the 1781 Resolution, opened the Convention by complaining that under the Articles, Congress "could not cause infractions of treaties or of the law of nations, to be punished." 2 *The Records of the Federal Convention of 1787*, at 19 (Max Farrand ed., 1911) ("*Farrand's Records*").[10]

It was also Randolph who proposed the provision that eventually became the Offenses Clause in an outline of the Constitution for the Committee of Detail. Under "legislative powers," he proposed:

> 6. To provide tribunals and punishments for mere offences against the law of nations.
>
> 7. To declare the law of piracy, felonies and captures on the high seas, and captures on land.

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[10] As here, some contemporaries at times referenced the "law of nations" as distinct from "treaties." While that occasional textual distinction is the principal argument against including treaties within the scope of the Offenses Clause, the overwhelming evidence is that the Founding Generation understood the law of nations to include treaties, and that the Offenses Clause embodies that understanding. *See infra* at 18-23.

Id. at 142-43. Punishment for offenses against the law of nations, including "treaties," of course, was precisely what the 1781 Resolution had unsuccessfully requested from the States. The Committee of Detail's August 6, 1787, draft gave Congress authority "[t]o declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations." *Id.* at 182. After several amendments on August 17, the delegates agreed to grant Congress the authority "to define and punish piracies and felonies committed on the high seas, counterfeiting the securities and coin of the U. States, and offences agst. the law of Nations." *Id.* at 316. The Committee of Style moved counterfeiting to a different clause, thus proposing the Offenses Clause as follows: "To define and punish piracies and felonies committed on the high seas, and punish offences against the law of nations." *Id.* at 595.

The Offenses Clause was debated again on September 14, when Gouverneur "Morris moved to strike out 'punish' before the words 'offences agst. the law of nations' so as to let these be *definable* as well as punishable." *Id.* at 614. James Wilson objected, arguing that "[t]o pretend to *define* the law of nations which depended on the authority of all the Civilized Nations of the World, would have a look of arrogance. [T]hat would make us ridiculous." *Id.* at 615. Wilson's objection failed, and the Offenses Clause took its present form.

Nothing in this exchange suggests that the delegates understood "the Law of Nations" in the Offens-

es Clause to exclude treaties. To be sure, Wilson appeared to refer in the above brief passage to the unwritten law of nations, but elsewhere Wilson repeatedly made it clear that he understood the "law of nations" to include treaties. *See infra* 21-22. That Wilson thought it could look arrogant to define one form of international law does not mean he believed the Offenses Clause was limited to that part. Nor does Morris's response that the law of nations was often vague suggest that the Clause is limited to the unwritten law of nations, as opposed to treaties. Ensuring that conduct subject to punishment should be stated clearly was a general concern of this provision's drafters. *See* 2 *Farrand's Records*, *supra*, at 315 (James Wilson) ("Strictness was not necessary in giving authority to enact penal laws; though necessary in enacting & expounding them."). But there was no necessary correspondence between treaties and clarity, or unwritten law and vagueness. On the one hand, the prohibition against piracy was part of the unwritten law of nations but was acknowledged not to require further definition by the legislature. *See The Federalist* No. 42, at 281 (Jacob E. Cooke ed., 1961) (Madison) ("The definition of piracies might, perhaps, without inconveniency, be left to the law of nations...."); *see also United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820) (Story, J.). On the other hand, some treaty provisions could require further definition. Thus, after Gideon Henfield's acquittal of violating neutrality provisions in several U.S. treaties in the most prominent neutrality prosecution, Congress passed the 1794 Neutrality Act specifying the kinds of acts that would be punishable. *See* 1 Stat. 381 (1794); *infra* at 29-30.

3. The Offenses Clause received little attention during the ratification debates, but the few discussions of the Clause support its application to treaties. Madison explained the need for the Clause in terms that applied equally to unwritten law and treaties, noting that the Articles of Confederation "contain no provision for the case of offenses against the law of nations; and consequently leave it in the power of any indiscreet member to embroil the Confederacy with foreign nations." *The Federalist* No. 42, *supra*, at 280-81 (Madison); *see also The Federalist* No. 3, at 15-16 (Jay) (giving violations of the treaty of peace with Britain as the example of the kind of "wrong" the National Government would have the power to "punish").

Moreover, a Massachusetts essayist understood, with specific reference to the Offenses Clause, that "[a] violation of such articles [of treaties] is properly defined as an offence against the law of nations." Anti-Cincinnatus, Hampshire (Mass.) Gazette, Dec. 19, 1787, *reprinted in* 5 *The Documentary History of the Ratification of the Constitution* 487, 489-90 (John P. Kaminski & Gaspare J. Saladino eds., 1998). Thus, "[o]ne of the few explicit discussions of the meaning of the Law of Nations Clause during ratification was an essay which argued that the Clause allowed Congress to punish violations of treaties." Kent, *supra*, at 929.

4. The principal argument for limiting the Offenses Clause to customary international law is that the "law of nations" was sometimes used in distinction to treaties. Randolph's opening statement at the Convention, quoted above, is one example. The

First Congress also referred to the law of nations and treaties separately in the Alien Tort Statute (ATS). *See infra* at 28-29. But such examples do not remotely overcome the history and purpose of the Offenses Clause, which demonstrates unequivocally that the Clause authorizes Congress to punish individual conduct to meet U.S. unwritten *and* treaty-based international obligations.

a. For one thing, the examples are more equivocal than they appear. For example, while Randolph's Convention speech referenced the "law of nations" as distinct from treaties, he also drafted the 1781 Resolution of the Continental Congress recommending that the States provide "punishment" for "offences against the law of nations." As discussed earlier, this Resolution was the forerunner of the Offenses Clause, and it expressly identified "infractions of treaties and conventions to which the United States are a party" as "offences against the law of nations." 21 *Journals of the Continental Congress*, *supra*, at 1136-37. As for the ATS, that statute was *itself* an exercise of Congress's Offenses Clause authority. *See infra* at 28-29. The ATS thus *confirms* the broad scope of the Offenses Clause by referring not only to the unwritten law of nations but also, expressly, to "a treaty of the United States."

b. Moreover, the overwhelming understanding of the "law of nations" in the Founding Era included *all* of international law, unwritten and treaty-based.

Both Blackstone (the most influential treatise writer of the period, *see Washington v. Glucksberg*, 521 U.S. 702, 712 (1997)) and Vattel (the most influ-

ential writer on international law, *see U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452, 462 n.12 (1978)) clearly understood the "law of nations" to encompass all of international law, including treaties. According to Vattel, the law of nations had several categories. The unwritten law of nations included norms derived from the law of nature and norms based on state practice. E. de Vattel, The Law of Nations, Intro. §§ 7-9, 21, 25-26, 28 (1758) (Charles G. Fenwick trans., 1916). But Vattel also recognized that the term included what he called the "conventional law of nations," based on consent in the form of treaties: "The various agreements which Nations may enter into give rise to a new division of the Law of Nations which is called conventional, or the law of treaties." *Id.* Intro § 24; *see also id.*, Preface, at 11a; Book I, § 93; Book III, § 192; *accord* Jean-Jacques Burlamaqui, *The Principles of Natural and Politic Law*, Part IV, Ch. 9, § I (1747) (Thomas Nugent trans. 1763) ("The subject of public treaties constitutes a considerable part of the law of nations.").

Blackstone similarly understood the law of nations to include treaties. He explained that the "law of nations" "must necessarily result from those principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual compacts or treaties between the respective communities." 4 William Blackstone, *Commentaries* * 66-67 (1769).

c. Influential individuals of the Founding Era, including the drafters of the Offenses Clause, shared this understanding, and repeatedly referenced the

law of nations as including treaties before and after the drafting of the Offenses Clause. In a 1791 memorandum commenting on Attorney General Randolph's report on the judiciary, Justice Iredell, relying on Vattel, explained that the "Conventional Law of Nations ... is that part of the Law of Nations arising from Treaties; which when made according to the constitutional power of the respective Countries is undoubtedly binding on both." James Iredell's Memorandum on Attorney General Edmund Randolph's Report on the Judiciary (1791), *in* 4 *The Documentary History of the Supreme Court of the United States*, 1789-1800, at 542 (Maeva Marcus ed. 1992). Alexander Hamilton held the same view. In his 1784 representation of the British defendants in *Rutgers v. Waddington*, Hamilton relied on Vattel to argue that "[t]he positive or external law of nations [is] subdivided into the *voluntary*[,] the *conventional* and the *customary*." Alexander Hamilton, Brief No. 2 in *Rutgers v. Waddington* (N.Y. Mayor's Court 1784), *in* 1 *The Law Practice of Alexander Hamilton: Documents and Commentary* 341 (Julius Goebel, Jr. ed., 1964). And Thomas Jefferson explained that the "Law of nations ... is composed of three branches. 1. The Moral law of our nature. 2. The Usages of nations. 3. Their special Conventions." Sec'y of State Thomas Jefferson, Opinion on French Treaties (Apr. 28, 1793), *in* 6 *The Writings of Thomas Jefferson* 219, 220 (Paul Leicester Ford ed., G.P. Putnam's Sons 1895).

James Wilson—who not only was a delegate to the Constitutional Convention but also was particularly involved in debates concerning the Offenses Clause, *see supra* at 16-17—explained in lectures

shortly after ratification that "[n]ational treaties are laws of nations, obligatory solely by consent." James Wilson, Lectures on Law Delivered in the College of Philadelphia in the Years 1790 and 1791, *in* 1 *The Works of James Wilson* 150 (Robert Green McCloskey ed., 1967); *see also id.* at 165 (consent-based norms are "one part of the law of nations"). While serving as a Justice of this Court, Wilson also instructed a grand jury that "there are laws of nations which are founded altogether on human consent; of this kind are national treaties." *Henfield's Case*, 11 F. Cas. at 1107.

d. Beginning soon after the Constitution's ratification, and continuing well into the nineteenth century, this Court consistently and repeatedly evinced the same understanding that the law of nations includes treaties.

Justice Chase's opinion in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), presented the first explanation from this Court of the scope of the "law of nations," including "conventional" law based on "express consent":

> The law of nations may be considered of three kinds, to wit, general, *conventional*, or customary. The first is universal, or established by the general consent of mankind, and binds all nations. The second is founded on *express consent*, and is not universal, and only binds those nations that have assented to it. The third is founded on tacit consent; and is only obligatory on those nations, who have adopted it.

Id. at 227 (first and second emphases added).

Chief Justice Marshall and Justice Story exhibited the same understanding. *See, e.g., Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch) 191, 198 (1815) (Marshall, C.J.) ("The law of nations is ... in part unwritten, and in part conventional."); *United States v. The La Jeune Eugenie*, 26 F. Cas. 832, 846 (C.C. Mass. 1822) (Story, J.) (noting that "the law of nations may be deduced" partly "from the conventional or positive law, that regulates the intercourse between states"). Other opinions of this Court were to the same effect. *See, e.g., The Venus*, 12 U.S. (8 Cranch) 253, 283 (1814) (describing the "conventional law of nations"); *The Estrella*, 17 U.S. (4 Wheat.) 298, 307 (1819) (noting a jurisdictional rule "well established by the customary and conventional law of nations").

The predominant Eighteenth Century understanding, therefore, was that the term "law of nations" referred to the entire corpus of international law, including treaties. If knowledgeable members of the Founding Generation were asked whether treaty obligations were part of the "law of nations," they would certainly have agreed with Vattel and Blackstone and answered "yes." At the very least, no one would doubt that including treaties within the "law of nations" is a plausible understanding of that term. And it is the only understanding that comports with the specific history and purpose of the Offenses Clause. That understanding is also reflected in this Court's precedents.

B. This Court Has Confirmed That The Purpose Of The Offenses Clause Is To Secure Compliance With All The United States' International Obligations

1. This Court has explained that the purpose of the Offenses Clause is to secure compliance with the United States' international obligations.

In *Boos v. Barry*, for example, the Court confirmed that "the United States has a vital national interest in complying with international law" and that "[t]he Constitution itself attempts to further this interest by expressly authorizing Congress '[t]o define and punish ... Offenses against the Law of Nations.'" 485 U.S. at 323. The Court did not distinguish between customary international law and treaties. Indeed, the Court noted that the law at issue was most strongly supported by Article 22 of the Vienna Convention on Diplomatic Relations, "which all parties agree represents the current state of international law." *Id.* at 322.

Similarly, this Court in *United States v. Arjona* upheld a statute criminalizing the counterfeiting of foreign securities as a proper exercise of Congress's power under the Offenses Clause. The Court observed that "Congress is expressly authorized to 'define and punish ... offences against the law of nations" because the National Government is "responsible to foreign nations for *all* violations by the United States of their international obligations." 120 U.S. at 483 (emphasis added). And the Court concluded that "if the thing made punishable is one which the United States are required by their international obligations to use due diligence to prevent,

it is an offence against the law of nations." *Id.* at 488. In other words, *Arjona* held that the Clause "permit[s] Congress to punish actual violations of the law of nations but also to punish offenses that would trigger the international responsibility of the United States if left unpunished." Jack L. Goldsmith, The Heritage Guide to The Constitution, Define and Punish Clause.[11] And while *Arjona* did not involve a treaty obligation, the Court's rationale for the Clause applies equally to treaties. *See* Henkin, *supra*, at 70 (under *Arjona*, Congress may "enforce by criminal penalties any new international obligations the United States might accept").

This Court's military commission cases have expressly applied the Offenses Clause to treaties. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court upheld Congress's authority to establish military commissions in Article 15 of the 1920 Articles of War. The Court explained that Congress had "exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals." *Id.* at 28. The Court made clear that treaties were included in the law of nations that Congress had defined and punished, relying expressly on the Fourth Hague Convention of 1907 as stating the crucial distinction between lawful and unlawful "bellig-

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[11] *Available at* http://www.heritage.org/constitution#!/articles/1/essays/48/define-and-punish-clause.

erents." *See id.* at 34-35; *see also In re Yamashita*, 327 U.S. 1, 7-8, 14-16 (1946) (reiterating that Article 15 was an exercise of the Offenses Clause authority, and relying heavily on the Fourth and Tenth Hague Conventions, and the Geneva Red Cross Convention of 1929 for the punishable violations); *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006) (invalidating 2001 military commissions as inconsistent with the "with the 'rules and precepts of the law of nations'—including ... the four Geneva Conventions signed in 1949" (citation omitted) (quoting *Quirin*, 317 U.S. at 28)); *id.* at 601-02 (plurality opinion) (observing that the elements of an offense triable by military commission may be "defined by statute or treaty" or by "plain and unambiguous" customary international law).

Thus, in construing the Offenses Clause, and consistent with its purpose, this Court has not distinguished between unwritten international law and treaties. The Court's jurisprudence instead recognizes that the Clause applies to all forms of international law.

2. There is no plausible reason why Congress should have plenary authority to punish violations of obligations derived from customary international law under the Offenses Clause, but not treaties. Treaties have been intertwined with customary international law from the Founding. Early treaties defined the United States' obligations with respect to neutrality and granted safe conducts that the United States also had an obligation to enforce under customary international law. *See supra* at 10-12. In 1788, the year after the Constitutional Convention,

the United States entered a Consular Convention with France, 8 Stat. 106 (1788), supplementing U.S. obligations toward diplomats under the unwritten law of nations. The same is true today. The Hague and Geneva Conventions at issue in the military commission cases represent both the codification of customary international law and the progressive development of the international law of war. Similarly, the Vienna Convention on Diplomatic Relations establishes the modern international law rules concerning diplomatic agents. *See Boos*, 485 U.S. at 322.

Whether reflecting custom or not, treaties are, and have always been, a crucial part of the United States' relations with foreign nations, as the Offenses Clause's history amply demonstrates. But the importance of treaties—and thus the crucial importance of enforcing them—has only increased over time. "In our day, treaties have become the principle vehicle for making law for the international system." Restatement (Third) of Foreign Relations Law, Introductory Note. Punishing individual infractions of U.S. treaty obligations thus is increasingly vital to the core purpose of the Offenses Clause.

In sum, the Offenses Clause is part of a comprehensive scheme to ensure that the National Government has sufficient authority to comply with its international obligations. The purpose of the Offense Clause identified by this Court, and supported by the history and original understanding of the Clause, applies to *all* international law obligations. There is no basis to depart from that understanding, particularly as the importance of treaties—and thus

the importance of Congress's authority to implement them—has grown since the Founding.

II. CONGRESS HAS REPEATEDLY RELIED ON THE OFFENSES CLAUSE TO IMPLEMENT TREATIES

"The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring). Not only does the original understanding of the Offenses Clause extend to treaties, but Congress has repeatedly relied on the Clause to implement treaties through criminal or civil liability.[12] Legislation from the 1789 Alien Tort Statute to the 2006 Military Commissions Act shows that Congress has consistently understood the Offenses Clause as authority for legislation implementing the United States' treaty obligations.

1. As mentioned earlier, Congress first exercised its authority under the Offenses Clause in 1789 by enacting the ATS to provide district court jurisdiction over "all causes where an alien sues for a tort only in violation of the law of nations *or a treaty of the United States*." Judiciary Act, ch. 20, § 9, 1 Stat.

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[12] The Offenses Clause permits Congress to punish by imposing civil or criminal liability. *See* Stephens, *supra*, at 483-525. For example, this Court has noted that Congress relied on the Offenses Clause in passing the Foreign Sovereign Immunities Act, a statute concerning civil liability. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989).

73, 76-77 (1789), *codified as amended at* 28 U.S.C. § 1350 (emphasis added). Although the ATS did not expressly invoke any constitutional grant of authority, it is commonly understood to fall within the Offenses Clause. *See, e.g.*, Kontorovich, *supra*, at 1678; Henkin, *supra*, at 358-59 n.20. It would have been logical for Congress to rely on the Offenses Clause in passing the ATS because both the statute and the constitutional provision had their origins in the same 1781 Resolution, discussed above, which recommended that the States provide "punishment" for "offences against the law of nations," including treaty violations. *See Sosa*, 542 U.S. at 716, 721-23 (discussing relationship of 1781 Resolution to the ATS). And like the 1781 Resolution, the ATS extended not just to violations of the unwritten law of nations but also to violations of "a treaty of the United States."

Congress exercised its authority under the Offenses Clause again the following year, when it passed the Crimes Act of 1790, which punished piracy, violations of safe-conducts, and violence against ambassadors. *See* 1 Stat. 112. These provisions criminalized violations of the unwritten law of nations as well as obligations established by treaty, particularly those providing for safe-conducts. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 874-79 (2006). The Crimes Act did not itself fully implement the recommendations in the 1781 resolution—it did not address neutrality and lacked a general prohibition against violating treaties. But Congress's failure to enact such provisions does not mean that Congress lacked authority to do so. The assumption in 1790 was that at least some treaty

violations could be prosecuted at common law, as they were in the neutrality prosecution in *Henfield's Case*, 11 F. Cas. at 1109-15 (charging violations of the treaties with Britain, the Netherlands, and Prussia, as well as violations of the unwritten law of nations).

Notably, following Henfield's acquittal, Congress passed the 1794 Neutrality Act, 1 Stat. 381, which implemented what Congress understood to be a general obligation of the unwritten law of nations *and* the provisions of U.S. treaties pledging peace between the countries' inhabitants. Although Congress did not specify the source of its authority, this Court has identified the Neutrality Act as Offenses Clause legislation. *See Arjona*, 120 U.S. at 488.

2. Congress's first extended discussion of its authority under the Offenses Clause involved the 1884 Counterfeiting Act at issue in *Arjona*. That Act did not implement a treaty. But the accompanying House Report described Congress's authority as extending to all of "international law":

> "The law of nations," as used in this clause, is obviously what is now known among publicists as international law; in other words, what the Constitution termed the law of nations, or *jus gentium*, is now termed the *jus inter gentes*, or international law.
>
> Whatever, therefore, may be regarded as an offense against the law which regulates the just relations between na-

> tions may be defined and punished [under the Clause].

H.R. Rep. No. 48-1329, at 1 (1884).

Four years later, Congress enacted the Submarine Cable Act of 1888 (25 Stat. 41), which expressly invoked the Offenses Clause as authority to implement the Convention for the Protection of Submarine Telegraph Cables, Mar. 14, 1884, U.S.T.S. 380. That treaty states that injuring submarine cables is a punishable offense, *id.* art. II, and requires states-parties to proscribe certain offenses, *id.* art. XII. The bill that became the 1888 Act was twice reported out of the House Committee on Foreign Affairs, and each Committee specifically pointed to the Offenses Clause and the Commerce Clause as providing sufficient basis for the bill. H.R. Rep. No. 49-3198, at 3 (1886); H.R. Rep. No. 50-524, at 3 (1888).

To take a more recent example, Congress in 1984 enacted the Aircraft Sabotage Act, Pub. L. No. 98-473, 98 Stat. 2187, Chapter XX, Subpart B, "to implement fully the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation." *Id.* § 2012(3). That Convention required each party "to make the offences [defined therein] punishable by severe penalties." 24 U.S.T. 565, art. 3. Congress explained that offenses under the Convention "are offenses against the law of nations." 98 Stat. 2187 § 2012(2); *see also* S. Rep. No. 98-619, at 2 (1984) (Act "is an exercise of the treaty power, of the power to regulate interstate and foreign commerce, and of the power to punish offenses against the law of nations").

Congress's citation of the Offenses Clause as authority to implement treaties has become more frequent in recent years. In 1992, for example, Congress enacted the Torture Victim Protection Act, 28 U.S.C. § 1350 note, in part to implement the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027 (1984), specifically invoking the Offenses Clause as one basis for its authority, S. Rep. No. 102-249, at 3, 5-6 (1991). Congress invoked the Offenses Clause (H.R. Rep. No. 104-698, at 7 (1996)) in enacting the War Crimes Act of 1996, Pub. L. No. 104-192, 110 Stat. 2104, which implemented the Geneva Conventions' requirement that parties "provide effective penal sanctions for ... grave breaches of the present Convention." *See, e.g.*, Geneva Convention (III) relative to the Treatment of Prisoners of War, August 12, 1949, 6 U.S.T. 3316, art. 130. In 1998, Congress invoked the Offenses Clause (S. Rep. 105-277, at 2-3 (1998)) in amending the Foreign Corrupt Practices Act to implement the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 17, 1997, S. Treaty Doc. No. 105-43, Article 1 of which requires each party to "establish that it is a criminal offence under its law for any person [to bribe a foreign public official]." And in the Military Commissions Act of 2006, Congress relied on the Offenses Clause in authorizing trial by military commission of "unlawful enemy combatants" for violations of the laws of war found in "international treaties and U.S. criminal law." H.R. Rep. No. 109-664, at 24 (2006); *see also id.* at 25 (noting that "[m]ost of the listed offenses constitute clear violations of the Geneva Conventions, the

Hague Convention, or both"). Thus, Congress consistently has recognized that the Offenses Clause allows Congress to punish conduct condemned in treaties.

III. THE OFFENSES CLAUSE AUTHORIZED CONGRESS TO ENACT THE CHEMICAL WEAPONS CONVENTION IMPLEMENTATION ACT

When Congress enacted the Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, Div. I, 112 Stat. 2681-856, it did not specify the source of its constitutional authority. But "it has never been supposed [that statutes resting on the Offenses Clause were] invalid because they did not expressly declare that the offences there defined were offences against the law of nations." *Arjona*, 120 U.S. at 488. "The question of the constitutionality of an action taken by Congress does not depend on recitals of the power which it undertakes to exercise." *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948).

Petitioner does not contest the validity of the Convention. Pet. Br. i, 16. Article VII(1)(a) of the Convention obligates the United States to "[p]rohibit natural and legal persons ... from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity." As the United States explains, "[t]he criminal provisions of the Act mirror in all material respects the prohibitions of the Convention." U.S. Br. 3. Because the Act punishes conduct pursuant to an international obligation of the United States, it is a valid exercise of Congress's authority

to "define and punish ... Offences against the Law of Nations."

The only possible objection to this straightforward conclusion is that the Convention *itself* does not prohibit individuals from developing, acquiring, or using chemical weapons, but instead obligates the states-parties to do so. That objection, however, misunderstands both the nature of most treaties and the scope of the Offenses Clause. Domestic processes for treaty implementation differ, and for this reason, treaties like the Convention obligate a state-party to "adopt the necessary measures to implement its obligations under this Convention" "*in accordance with its constitutional processes*." Convention art. VII(1) (emphasis added). As explained, this is common in both old and modern treaties that Congress has implemented under the Offenses Clause. *See supra* Part II; *see also* Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, *supra*, art. 3 ("Each Contracting State undertakes to make the offences mentioned in Article 1 punishable by severe penalties."); Convention for the Protection of Submarine Cables, *supra*, art. XII (obligating states "to take or to propose to their respective legislatures the necessary measures for insuring the execution of the present Convention").

Such provisions clearly impose obligations on the United States. And as explained earlier, the Offenses Clause has historically been understood to authorize Congress to punish not only what international law directly proscribes, but also conduct that international law condemns: "if the thing made punishable is one which the United States are required

by their international obligations to use due diligence to prevent, it is an offence against the law of nations." *Arjona*, 120 U.S. at 488. That is precisely what Congress did when it implemented the Convention.

IV. THE OFFENSES CLAUSE CONFIRMS THAT IMPLEMENTATION OF VALID TREATIES IS A UNIQUELY NATIONAL AUTHORITY

This Court need not rely on the Offenses Clause to resolve this case. Congress's authorities under the Commerce Clause, the Article II Treaty Power, and the Necessary & Proper Clause are more than sufficient to sustain the Act's constitutionality. *See* U.S. Br. 17-55. But the purpose and history of the Offenses Clause demonstrate a more fundamental flaw in petitioner's argument. Petitioner argues that the "federal government may step into the States' traditional criminal realm only when it targets conduct that implicates matters of national or international, not just local, concern." Pet. Br. 22. As the Offenses Clause shows, fulfilling the United States' international obligations is *always* a matter of national concern, and *never* purely a local matter. Congress's authority under the Offenses Clause, of course, "does not prevent a state from providing for the punishment of the same thing." *Arjona*, 120 U.S. at 487.

The Treaty Power has long been understood to reach matters ordinarily with the jurisdiction of the States. U.S. Br. 29-46. Once the President has ratified a treaty with the concurrence of two-thirds of the Senate (a body designed to represent the States),

"the United States has a vital national interest in complying with international law." *Boos*, 485 U.S. at 323. The Offenses Clause is part of a constitutional scheme that was established precisely to avoid depending on the States for enforcement of U.S. international obligations. *See supra* at 6-18.

Remarkably, what the Framers saw as a problem, petitioner sees as a solution. She contends that at least in some circumstances, the United States must rely on "state and local governments [to] ensure that the United States is in compliance with its international treaty obligations." Pet. Br. 31. That position turns the constitutional design on its head, and invites the precise state of affairs that the Framers sought to escape.

* * *

The Offenses Clause was intended to secure the United States' place in the community of nations by allowing Congress to punish those acts that the world condemned, including through treaties. That purpose is even more vital today, as international law is increasingly codified. But the Offenses Clause is not the only provision of the Constitution that ensures the National Government's ability to comply with its international obligations, and other constitutional authorities amply support Congress's authority here. *See supra* at 6-8. If this Court were to conclude that the Offenses Clause is limited to customary international law, that result would only reaffirm that Congress must have full power to carry out the United States' treaty obligations under the Necessary & Proper Clause. Otherwise the Nation's international law commitments would again be left

to the States, and a core purpose of the constitutional design would be frustrated.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

The 1781 Resolution of the Continental Congress recommending that States enact laws to punish offenses against the law of nations, reproduced in 21 *Journals of the Continental Congress* 1774-1779, at 1136-37 (Gaillard Hunt ed., 1912), read as follows:

On a report of a committee, consisting of Mr. [Edmund] Randolph, Mr. [James] Duane, Mr. [John] Witherspoon, appointed to prepare a recommendation to the states to enact laws for punishing infractions of the laws of nations:

The committee, to whom was referred the motion for a recommendation to the several legislatures to enact punishments against violators of the law of nations, report:

That the scheme of criminal justice in the several states does not sufficiently comprehend offenses against the law of nations:

That a prince, to whom it may be hereafter necessary to disavow any transgression of that law by a citizen of the United States, will receive such disavowal with reluctance and suspicion, if regular and adequate punishment shall not have been provided against the transgressor:

That as instances may occur, in which, for the avoidance of war, it may be expedient to repair out of the public treasury injuries committed by individuals, and the property of the innocent be exposed to reprisal, the author of those injuries should compensate the damage out of his private fortune.

Resolved, That it be recommended to the legislatures of the several states to provide expeditious, exemplary and adequate punishment:

First. For the violation of safe conducts or passports, expressly granted under the authority of Congress to the subjects of a foreign power in time of war:

Secondly. For the commission of acts of hostility against such as are in amity, league or truce with the United States, or who are within the same, under a general implied safe conduct:

Thirdly. For the infractions of the immunities of ambassadors and other public ministers, authorised and received as such by the United States in Congress assembled, by animadverting on violence offered to their persons, houses, [carriages and property, under the limitations allowed by the usages of nations; and on disturbance given to the free exercise of their religion: by annulling all writs and processes, at any time sued forth against an ambassador, or other public minister, or against their goods and chattels, or against their domestic servants, whereby his person may be arrested: and,

Fourthly. For infractions of treaties and conventions to which the United States are a party.

The preceding being only those offences against the law of nations which are most obvious, and public faith and safety requiring that punishment should be co-extensive with such crimes:

Resolved, That it be farther recommended to the several states to erect a tribunal in each State, or to vest one already existing with power to decide on of-

fences against the law of nations, not contained in the foregoing enumeration, under convenient restrictions.

Resolved, That it be farther recommended to authorise suits to be instituted for damages by the party injured, and for compensation to the United States for damage sustained by them from an injury done to a foreign power by a citizen.][1]

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[1] This report, in the writing of Edmund Randolph, is in the *Papers of the Continental Congress*, No. 28, folio 197.

The part in brackets was entered in the Journal by George Bond.

AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
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No. 12-158

In The
Supreme Court of the United States

CAROL ANNE BOND,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF *AMICUS CURIAE* OF CONSTITUTIONAL ACCOUNTABILITY CENTER IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Constitutional Accountability Center (CAC) is a think tank, public interest law firm, and action center dedicated to fulfilling the progressive promise of our Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in preserving the balanced system of government laid out in our nation's charter and accordingly has an interest in this case. *Amicus* submits this brief to demonstrate that the text, structure, and history of the Constitution all support Congress's authority to enact laws to implement validly-enacted treaties. *Amicus* does not, however, take a position on whether the particular prosecution challenged in this case is permissible under the terms of the Chemical Weapons Convention Implementation Act.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Carol Bond ("Bond") was convicted of violating, *inter alia*, the Chemical Weapons Convention Implementation Act of 1998, Pub. L.

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk. Under Rule 37.6 of the Rules of this Court, *amicus* states no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to the brief's preparation or submission.

No. 105-277, 112 Stat. 2681-856, *codified* at 18 U.S.C. §§ 229 *et seq.*, a statute enacted to implement the United States' obligations under the Chemical Weapons Convention. Petitioner argues, *inter alia*, that her conviction cannot stand because the statute does not apply to her conduct or, if it does, that it is unconstitutional as applied to her case. *See, e.g.*, Pet. Br. 12, 42.

Amici Cato Institute, the Center for Constitutional Jurisprudence, and Atlantic Legal Foundation (collectively, "Cato et al.") press a much broader argument, namely, that this Court should overrule *Missouri v. Holland*, 252 U.S. 416 (1920), which held that "[i]f [a] treaty is valid there can be no dispute about the validity of the [implementing] statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 432.[2] *Amicus* submits this

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[2] Petitioner also argues that *Holland* should be overruled, but only if that case is construed to hold that "Congress' power to implement treaties is immune from the Constitution's structural constraints." Pet. Br. 33. She concedes that "a valid non-self-executing treaty may alter the scope of what legislation is necessary and proper, just as valid commerce power legislation might allow Congress to enact a record-keeping requirement under the Necessary and Proper Clause that it would otherwise lack the authority to impose." *Id.* at 35-36. To be sure, as Petitioner notes, *Holland* recognized that there might be structural constraints on the Treaty Power, but it examined whether *the treaty* at issue was "forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Holland*, 252 U.S. at 433-34, not whether the implementing legislation was. The Court need not decide in this case what structural constraints, if any, impose limits on the scope of the Treaty Power. All this Court must decide is whether Congress has the power to enact implementing legislation for any treaty that does come within

brief to demonstrate that the text, structure, and history of the Constitution all support Congress's authority to enact laws that are, as this Court put it in *McCulloch v. Maryland*, 17 U.S. 316, 357 (1819), "appropriate means" to implement validly-enacted treaties.

The Constitution's Necessary and Proper Clause empowers the Congress "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [i.e., Congress's Article I, § 8 powers], and all other powers vested by this Constitution in the Government of the United States, or in any Departme..t or Officer thereof." As this Court has repeatedly recognized, the authority conferred by the Necessary and Proper Clause is a broad one, and the Framers did not limit it to executing laws enacted by Congress. Rather, they expressly extended it to "*all other powers* vested . . . in any Department or Officer thereof." Thus, by its terms, the Necessary and Proper Clause plainly confers on Congress the authority to make laws "necessary and proper for carrying into Execution" the powers granted to the President, including the Treaty Power. Read naturally then, the Necessary and Proper Clause authorizes Congress to enact legislation that is an "appropriate means" of implementing validly-enacted treaties.

Cato et al. dispute this basic proposition, arguing that the only treaty-related authority the

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those limits. *Holland* held that it does, and that decision should be re-affirmed.

Necessary and Proper Clause confers is the authority to pass laws to facilitate *making* treaties, not implementing them. But their approach to applying the Necessary and Proper Clause is inconsistent with the Framers' intent and might render unconstitutional other congressional powers that are beyond dispute. Moreover, even if Cato et al. were correct that Congress may only implement laws to facilitate the making of treaties, that fact would not undermine the holding in *Holland*. Because other countries will be reluctant to enter into agreements with the United States if it is unable to fulfill its international obligations, the Government's ability to implement ratified treaties is critical to its ability to *make* future treaties.

That the Necessary and Proper Clause authorizes Congress to enact laws to implement validly enacted treaties makes perfect sense in light of the importance the Framers attached to the Treaty Power and the Nation's ability to live up to its international obligations. When the Framers drafted our enduring Constitution, they departed in several critical respects from the precursor Articles of Confederation. As relevant here, the Framers were deeply concerned about the young Nation's reputation and credibility abroad and wanted to ensure that the federal government had the authority both to negotiate with foreign nations and to fulfill any obligations it might make to foreign nations. State interference with the Nation's treaty obligations was a serious problem under the Articles of Confederation and one of the primary impetuses for drafting the new Constitution in the first place. Thus, the new

Constitution conferred on the President the power, with the advice and consent of two-thirds of the Senate, to "make Treaties" with foreign nations that would then be the supreme law of the land. It would significantly undermine the Framers' intent in establishing the new Constitution if the federal government lacked the power to fulfill whatever treaty obligations the President and Senate might choose to create.

Indeed, in congressional debates subsequent to the Constitution's ratification, there was a great deal of agreement that the Necessary and Proper Clause provided Congress this power. For example, members of Congress who argued (contrary to the general assumption at the Framing) that not all treaties were self-executing and thus required implementing legislation often used the Necessary and Proper Clause to support their position. According to these representatives, treaties need not be self-executing precisely because Congress had the power to implement them by enacting legislation pursuant to the Necessary and Proper Clause—a conclusion that followed naturally from the Constitution's structure and text. In fact, such statements were a frequent refrain by both proponents and opponents of a robust Treaty Power throughout the nineteenth century. Thus, when this Court held in *Holland* that "there can be no dispute about the validity of" a statute implementing a treaty so long as the treaty is valid, 252 U.S. at 432, it was merely recognizing a point on which there was already considerable agreement: the Constitution's text and structure require that Congress have the power to implement

validly enacted treaties. This Court should reaffirm that holding now.

ARGUMENT

I. THE CONSTITUTIONAL TEXT CONFIRMS THAT CONGRESS HAS THE POWER TO IMPLEMENT TREATIES PURSUANT TO THE NECESSARY AND PROPER CLAUSE.

The Treaty Clause gives the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." U.S. Const. art. II, § 2, cl. 2. The Necessary and Proper Clause, in turn, provides Congress the authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" both "the foregoing Powers" enumerated in Article I, § 8, and "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." *Id.* art. I, § 8, cl. 18. The Framers thus expressly gave Congress the additional power necessary to legislate on subjects that were not otherwise enumerated in Article I, § 8, namely, subjects necessary to "carry[] into Execution" the powers granted to the President. Read most naturally, these provisions, taken together, provide Congress with the power to pass laws that are "necessary and proper" to execute the treaties agreed upon by the President and the Senate.

As this Court re-affirmed just last Term, "[t]he scope of the Necessary and Proper Clause is broad." *United States v. Kebodeaux*, 133 S. Ct. 2496, 2502 (2013); *see United States v. Comstock*, 560 U.S. 126, 130 S. Ct. 1949, 1956 (2010) ("the Necessary and Proper Clause grants Congress broad authority to enact federal legislation"). The reason for its breadth is self-evident: as this Court long ago recognized, although the federal government is "one of enumerated powers," "a government, entrusted with such" powers "must also be entrusted with ample means for their execution." *McCulloch v. Maryland*, 17 U.S. 316, 405, 408 (1819). Thus, "the Necessary and Proper Clause makes clear that the Constitution's grants of specific federal legislative authority are accompanied by broad power to enact laws that are 'convenient, or useful' or 'conducive' to the authority's 'beneficial exercise.'" *Comstock*, 130 S. Ct. at 1956; *see Kebodeaux*, 133 S. Ct. at 2503 (noting that even though the Constitution "makes few explicit references to federal criminal law," "the Necessary and Proper Clause nonetheless authorizes Congress, in the implementation of other explicit powers, to create federal crimes, . . . to hire guards and other prison personnel, to provide prisoners with medical care and educational training," and to take other actions not otherwise enumerated in Article I).

Applying this fundamental principle in *Missouri v. Holland*, this Court held that "[i]f [a] treaty is valid there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the

powers of the Government." 252 U.S. at 432. *Amici* Cato et al. dispute this basic proposition, arguing that the only treaty-related authority the Necessary and Proper Clause confers is the authority to pass laws to facilitate *making* treaties, not implementing them. Cato Br. 23-24. According to Cato et al., this result follows from a "proper[] conjoin[ing]" of the Treaty Clause and the Necessary and Proper Clause: "[w]hen the two clauses are properly conjoined," they argue, it is clear that "what may be carried into execution is the 'Power . . . *to make* Treaties." *Id.* at 23.

Amici's approach to reading the constitutional text produces a result that is contrary to the Constitution's text, purpose, and structure. Indeed, *Amici* do not cite a single case suggesting that this is the proper way to approach interpretation of the broad authority conferred by the Necessary and Proper Clause. Rather, the Necessary and Proper Clause does exactly what it says it does—it confers the authority to make laws "necessary and proper for carrying into Execution . . . all other powers vested by this Constitution." One of those powers is the Treaty Power, the power to enter into and execute agreements with foreign nations that the Framers viewed as critical to the future success of our young Nation, *see infra* at 11-16.

Moreover, extending *Amici's* approach beyond the Treaty Power would call into question the existence of other congressional powers that cannot be seriously contested. For example, under their approach, the Necessary and Proper Clause

"only justifies legislation that facilitates the 'establish[ing] of post offices and postal roads (as opposed to matters like their maintenance) or that facilitates the 'constitut[ing]' of inferior federal courts (as opposed to matters like their operation)." Jean Galbraith, *Congress's Treaty-Implementing Power in Historical Practice* 12 (2013) (working paper; available at http://ssrn.com/abstract=2275355). Perhaps *Amici* mean to suggest that the Necessary and Proper Clause should be read differently in conjunction with the Treaty Power than with the enumerated powers of Article I, § 8. But this reading would "relegate[] [the Treaty Power] to the status of a poor relation," *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994), a result for which there is no support in the Constitution's text.

Further, even if *Amici*'s general approach were correct, Congress would still enjoy the power to enact implementing legislation because such legislation is necessary and proper for the "making" of treaties. Most generally, if the United States is unable to honor its international obligations, there is no reason to think that other countries will continue to enter into treaties with the United States. *See infra* at 14-15. Thus, the enactment of implementing legislation for prior treaties facilitates the United States' ability "to make" treaties in the future.

More specifically, Congress will sometimes need to enact implementing legislation in order to "make" the very treaty that is being implemented. Cato et al. argue otherwise, relying on this Court's

admonition in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), that "the right to *make* contracts does not extend, as a matter of either logic or semantics, to conduct . . . *after* the contract relation has been established," *id.* at 177 (emphasis added), quoted in Cato Br. 25. But this misses the point. In the context of treaties—unlike private contracts—the contract relation often is not established until *after* implementing legislation has been passed because the treaty itself may make its entry into force conditional on the enactment of implementing legislation, or the President may delay joining the treaty until after Congress has acted. *See* Galbraith, *supra*, at 13 ("historically U.S. practice has sometimes required that the implementation of treaties occur prior to their ratification or entry into force"); Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 Am. Soc'y Int'l L. Proc. 412, 414 (2008) (explaining that "the Executive almost always waits for Congress to enact [implementing] legislation *before* joining the treaty").[3] In these cases then, implementing legislation is necessary to *make* the Treaty in the most basic sense of the term.

Thus, as this Court recognized nearly a century ago, the text of the Constitution authorizes Congress to enact laws that are "proper means" of implementing validly enacted treaties. *See*

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[3] Hollis provides a specific example of this phenomenon: as of his article's publication in 2008, "even though the Senate gave advice and consent to ratification of the Basel Convention on Hazardous Wastes in 1992, the President ha[d] withheld U.S. ratification because Congress ha[d] still not enacted the statutes necessary for U.S. compliance." Hollis, *supra*, at 414.

Holland, 252 U.S. at 432; *McCulloch*, 17 U.S. at 358.[4]

II. CONGRESS'S AUTHORITY TO ENACT IMPLEMENTING LEGISLATION IS CRITICAL TO THE FRAMERS' VISION OF A ROBUST TREATY POWER.

That the Constitution's text provides Congress the power to enact treaty-implementing legislation makes sense in light of the importance the Framers attached to the Treaty Power. To the Framers, the federal government's authority to make treaties with foreign nations was a significant one, essential to the future success of the young Nation. Indeed, "the failure of the States to comply with treaties [under the Articles of Confederation] . . . and the absence of any mechanism in the central government for assuring compliance with such treaties" were "[p]rominent among the reasons the Founders decided to abandon the Articles of Confederation and write a new Constitution." Carlos Manuel Vázquez, Missouri v. Holland's *Second Holding*, 73 Mo. L. Rev. 939, 940 (2008); *see* David M. Golove, *Treaty-*

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[4] To be sure, this rule confers some discretion on Congress, but that was exactly as the Framers intended it. *Cf.* Brief of Yale Law School Center for Global Legal Challenges ("YLS Center Br.") 10-11 (Framers recognized that treaty power must be "flexible"); *id.* at 2 ("The Framers considered proposals to qualify the Treaty Power, but ultimately rejected them all."). Moreover, there is an important structural check on the Treaty Power: approval of any treaty requires a two-thirds vote in the Senate. *See* YLS Center Br. 11 ("the power is subject to its own stringent *procedural* checks"); *see also id.* at 28-32; U.S. Br. 32.

Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power, 98 Mich. L. Rev. 1075, 1102 (2000); *see also* U.S. Br. 29-32; YLS Center Br. 4-7.

As James Madison explained in the Federalist Papers, the Articles of Confederation provided the federal government with "[t]he power to make treaties," but the power, as set out in the Articles, was insufficient because "of an exception, under which treaties might be substantially frustrated by regulations of the States." The Federalist Papers No. 42. This deficiency was perhaps most strikingly illustrated when the States resisted "carrying out the [Treaty of Peace's] painful financial and amnesty stipulations," and "severe tensions with Great Britain" were the result. *See* Golove, *supra*, at 1115-16. These tensions "concretely demonstrated the need" for a more robust treaty power and "the imperative for a mechanism that could ensure state compliance with treaty stipulations." *Id.* at 1116; *see* David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932, 934 (2010); *see also* YLS Center Br. 5-10 (discussing tensions produced by the United States' inability to fulfill its obligations under the Treaty of Paris).[5] Stated

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[5] The Framers' fear that the States would interfere with negotiations and treaty relations with foreign countries was so great that they not only "[gave] the entire Treaty Power [to] the federal government," but also "prohibit[ed] States from participation in foreign agreements not once but twice," YLS Center Br. 15, and otherwise limited the States' ability to interfere in the Nation's foreign affairs, *cf.* U.S. Const. art.

bluntly, the limitations placed on the treaty power under the Articles "were found very inconvenient in practice; and indeed, in conjunction with other defects, contributed to the prostration, and utter imbecility of the confederation." Joseph Story, Commentaries § 1501.

Thus, to the Framers, there was no question that the power to make treaties, along with other powers related to the "regulat[ion] [of] intercourse with foreign nations," "form[ed] an obvious and essential branch of the federal administration." The Federalist No. 42 (James Madison); *see id.* ("The powers to make treaties and to send and receive ambassadors, speak their own propriety."); The Federalist No. 64 (John Jay) ("The power of making treaties is an important one, especially as it relates to war, peace, and commerce . . . ."); Story § 1503 ("The power of making treaties is indispensable to the due exercise of national sovereignty, and very important, especially as it relates to war, peace, and commerce."). Accordingly, the Framers drafted a broad Treaty Power Clause that would give the new Nation considerable flexibility in its negotiations and interactions with foreign nations. *See* YLS Center Br. 10-11; Golove, *supra*, at 1102 ("there was, by

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1, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws"). Madison also "argued for a presidential role in treaty making—which did not exist under the Articles of Confederation—precisely because he feared Senators would be so loyal to states' sovereign prerogatives." Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239, 249 (2013).

1787, a fairly widespread consensus on the broad scope of the treaty power, especially among the most influential figures").

The Framers also designed the Constitution to ensure that the federal government would be empowered not only to enter into treaties with foreign nations, but also to make good on the commitments it made in those treaties. *See* Edward T. Swaine, *Putting* Missouri v. Holland *on the Map*, 73 Mo. L. Rev. 1007, 1016 (2008) (noting that the "Framers were wholly convinced of the need to systematically develop a compliance capacity precisely in order to sustain the U.S. treaty power"); YLS Center Br. 4 (federal government's inability "to secure state compliance with treaty obligations" "placed the very existence of the new nation at risk"). Informed by their experiences under the Articles of Confederation, the Framers feared that if the United States could not fulfill its treaty obligations, it would damage the young country's reputation and credibility abroad, *cf.* Golove & Hulsebosch, *supra*, at 935-36 (arguing that an important purpose of the Constitution was to help the new Nation achieve international recognition and respect), and it would make other nations less willing to enter into treaties with the United States, *see* The Federalist No. 64 ("a treaty is only another name for a bargain, and . . . it would be impossible to find a nation who would make any bargain with us, which should be binding on them ABSOLUTELY, but on us only so long and so far as we may think proper to be bound by it"); *id.* No. 75 (Alexander Hamilton) ("Its objects are CONTRACTS with foreign nations,

which have the force of law, but derive it from the obligations of good faith."); *see also* U.S. Br. 30-31; *cf.* Galbraith, *supra*, at 13 (arguing that "basic accounts of treaty negotiation . . . recognize that treaty negotiators take the likelihood of compliance into account and may demand stiffer terms or decline to negotiate with countries known to have past difficulties complying with treaties").

To guard against this possibility, the Framers drafted multiple constitutional provisions that would safeguard the Treaty Power and ensure that the new Nation could live up to any international obligations it made for itself. *See* YLS Center Br. 20-22 (discussing the Supremacy Clause and the Article III provision for judicial enforcement of treaties in the federal courts). As noted earlier, the Constitution also ensured that individual states would not disrupt any agreements the federal government negotiated with foreign states by preventing them from entering into treaties under all circumstances and international compacts without congressional consent. *See supra* at 12 n.5.

Given the importance the Framers attached to the Treaty Power and to the Nation's ability to honor its international commitments, it would plainly "contradict one of the Founders' key convictions" if the President could ratify a treaty that the Government would be without the power to implement. Vázquez, *supra*, at 940, and there is no reason to think the Framers would have designed such a system. Yet that would be the result if Congress does not have the authority to

enact implementing legislation for all validly enacted treaties. This cannot be right.

Amici Cato et al. do not explain how their view that Congress lacks the authority to enact treaty-implementing legislation can be reconciled with the Framers' view of a robust Treaty Power and the importance they attached to the ability of the United States to fulfill its international obligations. Instead, Cato et al. argue that the discretion *Holland* confers on Congress is "inconsistent with the basic constitutional scheme of enumerated powers" and in "deep tension with the Tenth Amendment's premise of reserved powers." Cato Br. 7; *see id.* at 12 ("Another way to put the point is that *Holland* permits evasion of Article V's constitutional amendment mechanism" because "the legislative power of Congress may be increased not just by constitutional amendment but also by treaty."). But the ratification of a new treaty does not increase the legislative power of Congress; it simply serves as the predicate for the exercise of Congress's pre-existing and enumerated power to make all Laws "which shall be necessary and proper for carrying into Execution" the Treaty Power. There is nothing novel about this result. Every enumerated power can be exercised in different ways as the topic it covers changes. For example, as the interstate economy grows or shrinks, the scope of Congress's authority to act pursuant to the Commerce Power also changes; likewise, when the country goes to war, Congress has more power to act pursuant to its War Power than it did before. This is a feature—not a bug—of our constitutional structure.

Thus, *Amici*'s constitutional argument runs up against the Constitution itself. Both the Treaty Power and the Necessary and Proper Clause are themselves powers expressly given to the federal government, and it is no answer to the question this case presents to say that our Constitution is one of enumerated powers. The question is how broadly each of those powers should be construed, and both the Constitution's text and structure confirm that those provisions allow Congress to pass appropriate implementing legislation for validly enacted treaties.

III. CONGRESSIONAL DEBATES AFTER THE FRAMING REVEAL A GENERAL UNDERSTANDING THAT CONGRESS HAS THE POWER TO IMPLEMENT TREATIES PURSUANT TO THE NECESSARY AND PROPER CLAUSE.

At the time of the Framing, there was little debate about the interaction between the Treaty Power and the Necessary and Proper Clause. This is hardly surprising: the Necessary and Proper Clause incontestably encompasses the Treaty Power, and that Power was among the most necessary and least controversial powers granted to the federal Government. Moreover, the Framers "assumed that most treaties would be self-executing," Hathaway, *supra*, at 250-51; *see* YLS Center Br. 23 n.5 (noting that Convention delegates rejected proposals to make treaties non-self-executing), thus making additional implementing legislation unnecessary.

Post-ratification statements in congressional debates did specifically address the issue, however, and suggest overwhelming support for the understanding that the Necessary and Proper Clause conferred on Congress the power to enact implementing legislation. For example, shortly after ratification, some members of Congress challenged the assumption that most treaties were self-executing and used the Necessary and Proper Clause to support their position. According to these representatives, the Necessary and Proper Clause was itself evidence that treaties need not be self-executing because it meant Congress had the power to implement them by enacting legislation.

For example, in 1796, shortly after the Constitution was adopted, the President ratified the Jay Treaty, which resolved lingering disputes between Great Britain and the United States. The decision to ratify the treaty was a controversial one, and many in the House of Representatives argued that the treaty could not take effect as domestic law without congressional approval. *See* Galbraith, *supra*, at 18. In arguing that the treaty could not take effect without congressional approval, these representatives often pointed to the Necessary and Proper Clause as evidence that Congress had the power to enact laws to implement treaties. Representative Page, for instance, observed that "Congress is authorized to make all laws necessary and proper to carry into effect all the powers granted by the Constitution, the Treaty-making power as well as others," and later commented that "Congress may and ought to pass laws to carry into

effect all such Treaties, provided they are not inconsistent with the general welfare." 5 Annals of Cong. 560, 561 (1796).

Representative Milledge also used the existence of the Necessary and Proper Clause—and the authority it provided Congress to enact implementing legislation—as evidence that such legislation was necessary before a treaty could have domestic effect. He argued that "Treaties ought to be bottomed on a law before they can have any binding influence," and then read aloud the Necessary and Proper Clause, explaining that "whatever powers are vested in [the President and Senate as the Treaty-making department] by the Constitution cannot be carried into execution but by a law, otherwise the clause in the Constitution means nothing." 5 Annals of Cong. at 651 (1796). And tellingly proponents of the Jay Treaty, although they did not believe that congressional implementation was required, did not "dispute the claim that [the Necessary and Proper Clause] authorized Congress to pass legislation implementing treaties." Galbraith, *supra*, at 20. To be sure, the laws to implement the Jay Treaty may have otherwise been within the scope of Congress's Article I powers, but these statements make clear that these representatives viewed the Necessary and Proper Clause as an additional source of authority to enact laws implementing the treaty. *See* Galbraith, *supra*, at 25 ("They clearly interpreted the Necessary and Proper Clause to apply to legislation passed to implement treaties, as opposed to legislation passed simply to facilitate the negotiation of treaties.").

The same dynamic played out in debates over subsequent treaties, as well. For example, in debating the 1815 commercial treaty with Britain following the conclusion of the War of 1812, members who argued that implementing legislation was required invoked the Necessary and Proper Clause in support of their position. *See, e.g.*, 29 Annals of Cong. 538-39 (1816) (statement of Rep. King) ("whenever a treaty or convention does, by any of its provisions, encroach upon any of the enumerated powers vested by the Constitution . . . such treaty or convention, after being ratified, must be laid before Congress, and such provisions cannot be carried into effect without an act of Congress. . . . [T]his construction is strengthened by a part of the general power given to Congress, following the enumerated powers, 'to make all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or office thereof.'"); *id.* at 66 (statement of Sen. Roberts) (citing the Necessary and Proper Clause as a "clause of especial importance" to the question whether a treaty can become a law without legislative sanction).[6] And during the Nineteenth Century, the Necessary and Proper Clause was also regularly invoked as a basis for enacting laws to

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[6] Of course, as the Framers intended and this Court has repeatedly recognized, treaties may be self-executing, in which case no implementing legislation is necessary to give them domestic effect. *See, e.g.*, *Medellin v. Texas*, 552 U.S. 491, 504 (2008) (noting that some treaties "automatically have effect as domestic law").

implement treaties, and at times as a basis for enacting treaty-implementing legislation even where there was no other source of congressional authority. *See generally* Section II.A of Brief for Professors David M. Golove, Martin S. Lederman and John Mikhail.

Accordingly, when *Missouri v. Holland* was decided, this Court's recognition that a statute implementing a validly enacted treaty was itself valid pursuant to the Necessary and Proper Clause was not a controversial one. Rather, there was considerable agreement on this point, reflecting both the text of the Constitution and the structural importance the Framers attached to the Treaty Power and the broad authority conferred by the Necessary and Proper Clause. This Court should re-affirm its decision in *Holland* and hold that Congress has the power to enact treaty-implementing legislation, regardless of whether Congress would otherwise have the power to enact that legislation under Article I.

CONCLUSION

The text, structure, and history of the Constitution all support the rule this Court adopted in *Holland*. Accordingly, *amicus* urges the Court to hold that Congress has the power to pass a statute to implement a validly enacted treaty, even if it does not otherwise have the power under Article I, § 8.

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BRIEFS

IN THE

Supreme Court of the United States

CAROL ANNE BOND,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF FORMER STATE DEPARTMENT LEGAL ADVISERS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) 16

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U.S. Const. Article VI, cl. 2 15

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Chemical Diversion and Trafficking Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988) 7

TABLE OF AUTHORITIES—Continued

Page(s)

Controlled Substances Act (CSA), Pub. L. No. 91-513, 84 Stat. 1236 (1970) 7

Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 463 (1994) (codified at 18 U.S.C. §§ 2340, 2340A) 19-20

Senate Rule XXV 18

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TREATIES

1961 Single Convention on Narcotic Drugs, as amended, Mar. 30, 1961, 18 U.S.T. 1408, 520 U.N.T.S. 204 6

1971 Single Convention on Psychotropic Substances, Feb. 21, 1971, T.I.A.S. No. 9725, 1019 U.N.T.S. 174 6

1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, May 20, 1988, 1582 U.N.T.S. 95 6-7

Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, U.S.T. 1087, 993 U.N.T.S. 243 13

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Jan. 13 1992, 1974 U.N.T.S. 45, 32 I.L.M. 800 8-9

TABLE OF AUTHORITIES—Continued

Page(s)

Convention on Road Traffic, Sept. 19, 1949, 3 U.S.T. 3008, 125 U.N.T.S. 22 ..... 12-13, 24, 25

The Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, S. Treaty Doc. No. 99-11 (1988)..... 8, 24-25

The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, S. Treaty Doc. No. 110-21, 47 I.L.M. 257 ..... 23, 25

The Hague Convention on the Law Applicable to Trusts and on Their Recognition, Oct. 20, 1984, 23 I.L.M. 1388 25

Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 29 12

Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S. Arg., Nov. 14, 1991, S. Treaty Doc. No. 103-2 (1993)..... 12

U.N. Convention Against Corruption (2006), Dec. 14, 2005, 2349 U.N.T.S. 145..... 21

U.N. Convention Against Hostage Taking, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205..... 23

TABLE OF AUTHORITIES—Continued

Page(s)

U.N. Convention on the Rights of the Child, No. 20, 1989, 28 I.L.M. 1448 22

U.N. Convention on the Rights of Persons with Disabilities, Mar. 30, 2007, 189 U.N.T.S. 137 22

U.N. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 19

U.N. Convention Against Transnational Organized Crime (2005), Nov. 15, 2000, 2237 U.N.T.S. 343 ..... 13, 21

Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (1969) 8, 24, 25

Vienna Convention on Dipolmatic Relations, art. 31, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95 ..... 24, 25

Vienna Convention on Law of Treaties arts. 2, 19-23, Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679 ..... 17, 19

OTHER AUTHORITIES

11 Forgein Affairs Manual, *Guidelines for Concluding International Agreements* (2006) 1, 15-16, 20

134 Cong. Rec. S324 (daily ed. Feb. 1, 1988) 21

TABLE OF AUTHORITIES—Continued

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136 Cong. Rec. S17,486-01 (daily ed. Oct. 27, 1990) 19

143 Cong. Rec. S3486 (daily ed. Apr. 23, 1997) 21

151 Cong. Rec. S9644 (daily ed. Aug. 31, 2005) 21

152 Cong. Rec. S8971 (daily ed. Sept. 5, 2006) 21

Andrew T. Guzman, *The Design of International Agreements*, 16 Eur. J. Int'l L. 579 (2005) 11

Brian R. Opeskin, *International Law and Federal States*, International Law and Australian Federalism (Brian R. Opeskin & Donald R. Rothwell eds., 1997) 11

David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) 22

David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan. L. Rev. 1963 (2003) 22

The Debates in the Several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787 (J. Madison) (Jonathan Elliot ed., 1891) 12

TABLE OF AUTHORITIES—Continued

Page(s)

Duane Tananbaum, *The Bricker Amendment Controversy, A Test of Eisenhower's Political Leadership* (1988) 13

Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 Am. Soc'y Int'l L. Proc. 412 (2008) 19

Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403 (2003) 11

Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 Duke L. J. 1127 (2000) 10

The Federalist No. 22 (A. Hamilton) (Roy P. Fairfield ed., 1981) 5-6

The Federalist No. 23 (A. Hamilton) (Roy P. Fairfield ed., 1981) 5

The Federalist No. 42 (J. Madison) (Clinton Rossiter ed., 1961) 6

The Federalist No. 62 (J. Madison) (Roy P. Fairfield ed., 1981) 22

The Federalist No. 64 (J. Jay) (Roy P. Fairfield ed., 1981) 10

Frank E. Holman, The Story of the "Bricker Amendment" (1954) 13

Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954) 22

TABLE OF AUTHORITIES—Continued

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H.R. 1896, 113th Cong. (2013) 23

Int'l Narcotics Control Bd., Report of the International Narcotics Board 11-12, 116 (2012), *available at* http://www.incb.org/documents/Publications/AnnualReports/AR2012/AR_2012_E.pdf 7

Letter from President Eisenhower to Majority Leader Knowland (Jan 25, 1954), *cited in* "Foreign Policy", Congressional Quarterly Almanac 10 (1954) 14

Letter of Transmittal of Pres. Harry S. Truman, Convention on Road Traffic, May 3, 1950 20-21

Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239 (2013) 25

The President's News Conference of March 26, 1953, Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1953 (U.S. Gov't Printing Office 1954) 4, 14

Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 Am. J. Int'l L. 633 (1962) 2

Treaties and Other International Agreements: The Role of the United States Senate, S. Prt. No. 106-71 (2001) 17, 18

TABLE OF AUTHORITIES—Continued

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U.N. Office on Drugs and Crime, Cannabis: A Short Review 22 (2012), *available at* https://www.unodc.org/documents/drug-prevention-and-treatment/cannabis_review.pdf 7

INTEREST OF *AMICI CURIAE* [1]

Amici are former Legal Advisers to the United States Department of State.[2] The signatories to this brief have collectively served for more than 20 years under both Democratic and Republican Presidents. During that period, *amici* were responsible for the review and ratification of more than 200 treaties. *Amici* have personally testified before the Senate in support of numerous treaties.

The Legal Adviser is the highest-ranking officer in the executive branch with specific responsibility for the legal aspects of treaty-making, including negotiation, ratification, and implementation. Especially relevant here, the Legal Adviser is charged with determining whether the United States has an appropriate domestic legal framework to become a party to a proposed treaty. "Any draft of a proposed treaty or agreement, or any action regarding the negotiation, conclusion, ratification or approval, or termination, as well as the existence, status, and application, of any international agreement to which the United States is or may become a party, should be cleared with the Office of the Legal Adviser." *Guidelines for Concluding International Agreements*, 11 Foreign Affairs Manual § 713.2 (2006). Moreover, the Legal Adviser "consults periodically with Congress on the full range of treaty issues," 11 Foreign Affairs Manual § 751, and the Legal Adviser's Office of Treaty

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[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief. All counsel of record have consented to this filing through blanket consents filed with the Court.

[2] A list of *amici* is contained in the appendix.

Affairs serves as the U.S. depository for multilateral agreements. *See* Richard B. Bilder, *The Office of the Legal Adviser: The State Department Lawyer and Foreign Affairs*, 56 Am. J. Int'l L. 633, 640, 648-54 (1962).

Amici thus are particularly well-suited to address the legal and practical implications of the issues presented in this case. The questions before the Court can only be properly answered with an understanding of the process for making and joining treaties, the role treaties play in American law and policy, and the compelling national interests served by compliance with international agreements.

Amici will focus on how petitioner's arguments affect the President's and Congress's treaty powers and will not address other questions, such as how the particular treaty and its implementing legislation should be interpreted and applied here.

SUMMARY OF ARGUMENT

Citing the "structural guarantees of federalism," petitioner asks this Court to prohibit Congress from implementing treaties that, in her view, affect matters of purely "local" concern. Petitioner attempts to reassure the Court that limiting Congress's implementation power in this way need not impair the United States' power to make treaties. But this is a false assurance. Adopting petitioner's proposed rule would significantly complicate the federal government's treaty powers and hamper the President's management of foreign affairs.

The Constitution reflects the Framers' recognition, based on experience under the Articles of Confederation, that the power to enter and implement treaties

must rest with the national government in order for the United States to be an effective sovereign on the international stage. Those same imperatives pertain today. The power to make treaties and the need to implement them are inherently intertwined. If Congress cannot fully implement a validly executed treaty, the United States may be unable to honor its international commitments. This would undercut the United States' foreign policy priorities, diminish the President's leverage to pressure nations to comply with their own obligations, and injure the United States' credibility as a world leader—not to mention undermine the efficacy of the treaty itself.

Petitioner's position also would hinder the President's ability to negotiate new treaties that may serve the national interest. If our treaty partners perceive that the United States cannot guarantee enforcement of a treaty that may regulate "local" conduct, they may walk away from the negotiating table or try to extract otherwise unwarranted concessions.

Nor is petitioner's proposed limitation on the treaty power necessary to protect state interests. The treaty-making process is already designed to address federalism concerns, including through the requirement that two-thirds of the Senate give its advice and consent. Both the executive and legislative branches account for federalism concerns during the treaty-making process. The President tailors negotiations to address important domestic policies. Once an agreement is reached, the President, the Senate, or both can set forth formal reservations, understandings, and declarations to clarify how the treaty will be implemented in the United States consistent with our federal system. Where U.S. ratification of a treaty requires implementing legislation, Congress may pass

a law that is necessary and proper to implement the treaty's terms under domestic law.

As a result of the careful attention paid to federalism in the treaty-making process, the federal government only joins treaties that strike the appropriate federal-state balance. A nebulous rule that limits the treaty power to certain subject areas would call existing treaties into question and prevent the United States from joining future treaties that advance national interests, without providing additional protections for federalism.

The debate over Congress's power to implement treaties that touch "local" concerns did not arise for the first time in petitioner's brief. Efforts to limit that power have been made and rejected at various points throughout the nation's history. Most notably, when Congress failed to adopt the Bricker Amendment in the 1950s, it rejected the type of limitation that petitioner proposes because of the undesirable consequences that would result. Then-President Eisenhower vehemently objected that the Bricker Amendment would "restrict the authority that the President must have, if he is to conduct the foreign affairs of this Nation effectively." Dwight D. Eisenhower, *The President's News Conference of March 26, 1953*, Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1953, 132 (U.S. Gov't Printing Office 1954). This Court should not read into the Constitution a new limitation on the federal government's treaty power, especially where Congress has refused to amend the Constitution to add that limitation.

ARGUMENT

The treaty power is a central part of the President's constitutionally vested "lead role in foreign policy." *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (citation omitted); *see also Missouri v. Holland*, 252 U.S. 416, 435 (1920). The Constitution gives the President power "to make treaties," U.S. Const. art. II, § 2, cl. 2, that are capable of confronting a "variety of national exigencies." The Federalist No. 23, at 59 (A. Hamilton) (Roy P. Fairfield ed., 1981). While there may be superficial appeal to preventing Congress from implementing treaties that affect what petitioner believes to be purely "local" conduct, such a rule would be unworkable. It would frustrate the federal government's exercise of the treaty power, complicate the President's management of foreign affairs, and hobble the President's efforts to pursue the national interest on behalf of U.S. citizens.

I. THE COURT SHOULD NOT IMPOSE NEW CONSTRAINTS ON THE FEDERAL GOVERNMENT'S POWERS TO NEGOTIATE AND IMPLEMENT TREATIES

A. Restricting Federal Implementation Would Impair the United States' Ability To Comply with Its Obligations and Would Complicate the President's Ability to Manage Foreign Affairs

1. The national government is responsible for the United States' compliance with all treaties. The Framers of the Constitution provided a centralized treaty power specifically to ensure that the United States would be capable of implementing and complying with its international obligations. *See, e.g.*, The Federalist No. 22, at 56 (A. Hamilton) (Roy P.

Fairfield ed., 1981) (without a centralized treaty power, "[t]he faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed"); The Federalist No. 42, at 264 (J. Madison) (Clinton Rossiter ed., 1961) (The United States must "be one nation . . . in respect to other nations.").

Petitioner's brief ignores the important role of treaty compliance in the President's management of foreign affairs. Unless the federal government has ample authority to ensure compliance with treaties, the President cannot effectively conduct foreign policy and present the United States as "one nation . . . in respect to other nations." *Id.*

2. In order to fulfill its international obligations, the federal government must have the ability to implement treaties. Many treaties are not self-executing. States may fail to pass or enforce necessary legislation, and the federal government cannot require states to do so. As a result, the interest of full compliance sometimes compels the United States to implement a treaty through federal measures.

Nowhere is the importance of federal legislation more evident than in U.S. efforts to combat the international drug trade. Stopping the sale of illicit narcotics has been among the United States' most important foreign relations priorities for decades. In a concerted effort to limit the international production and supply of certain dangerous drugs, the United States joined the 1961 Single Convention on Narcotic Drugs, as amended, Mar. 30, 1961, 18 U.S.T. 1408, 520 U.N.T.S. 204; the 1971 Convention on Psychotropic Substances, Feb. 21, 1971, T.I.A.S. No. 9725,

1019 U.N.T.S. 174; and the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, May 20, 1988, 1582 U.N.T.S. 95. Congress enacted the Controlled Substances Act (CSA), Pub. L. No. 91-513, 84 Stat. 1236 (1970), in large part to implement U.S. obligations under the 1961 Convention, *see* 21 U.S.C. § 801(7). Since then, Congress periodically has enacted new legislation to implement other obligations under subsequent conventions related to narcotics. *See, e.g.*, Chemical Diversion and Trafficking Act, Pub. L. No. 100-690, 102 Stat. 4181 (1988). The United States relies on these federal statutes to remain in compliance with international agreements.

Federal implementing legislation is particularly important in light of recent state referenda decriminalizing marijuana, a drug that is outlawed by international conventions. *See* U.N. Office on Drugs and Crime, Cannabis: A Short Review 22 (2012), *available at* https://www.unodc.org/documents/drug-prevention-and-treatment/cannabis_review.pdf. The head of the International Narcotics Control Board, which administers the drug conventions, has warned that state referenda may be inconsistent with the United States' treaty obligations. *See* Int'l Narcotics Control Bd., Report of the International Narcotics Board 11-12, 116 (2012), *available at* http://www.incb.org/documents/Publications/AnnualReports/AR2012/AR_2012_E.pdf. Thus, federal implementing legislation serves as an essential backstop that saves the United States from non-compliance with its treaty obligations. Were the United States to fail to comply with the international narcotics conventions that it has long championed, the United States would have little basis to complain if other countries failed to satisfy their own obligations.

Criminal drug laws are not the only area where the United States depends upon federal law to ensure treaty compliance with respect to conduct that may generally be considered a matter of state law. For example, federal legislation in the realm of family law is necessary to effectuate U.S. participation in The Hague Convention on Civil Aspects of International Child Abduction. *See infra* Part II.B.

Petitioner is mistaken that the Vienna Convention on Consular Relations (VCCR), Apr. 24, 1963, 21 U.S.T. 77, 101, 596 U.N.T.S. 261, 292 (1969), serves as a "perfect example" of a treaty that may rely entirely upon states for compliance. State non-compliance with the VCCR—which requires federal, state, and local officials to inform foreign nationals detained in the United States of their right to have a consular officer of their home country notified of their detention—actually has been a source of significant international tension, leading to three claims against the United States before the International Court of Justice and additional protests from foreign states. Federal legislation therefore may be the only way to implement U.S. obligations under the VCCR. *See* S. 1194, 112th Cong. (2011); *see also Medellin*, 552 U.S. at 525-26 ("The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."). In other words, where a "national interest of very nearly the first magnitude is involved . . . [i]t is not sufficient to rely upon the States." *Holland*, 252 U.S. at 435.

3. Many U.S. treaty obligations require not only federal implementing legislation but also federal enforcement. The Convention on the Prohibition of the Development, Production, Stockpiling and Use

of Chemical Weapons and on their Destruction ("Chemical Weapons Convention"), Jan. 13, 1992, 1974 U.N.T.S. 45, 32 I.L.M. 800, is one such example. Where states decline to prosecute the use of chemical weapons, the federal government may need to enforce the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229, in order to protect national interests. Just as drug sales may pose national or international concerns, so may the use of chemical weapons. And the greater the opportunity for individuals to use chemical weapons with impunity, the greater the opportunity for terrorists to learn about and use chemical weapons themselves.

Moreover, treaty compliance is a two-way street. If the use of chemical weapons goes unenforced here in the U.S., then the nation loses critical leverage should Pakistan, for example, decline to fulfill its obligations under the Chemical Weapons Convention to investigate and prosecute arguably "local" conduct in its autonomous tribal regions. The same is true for numerous other important national security treaty implementing regimes. *See, e.g.*, 18 U.S.C. § 175(A) (implementing the Biological Weapons Convention).

Conduct that may appear to be purely "local" when viewed in isolation can actually have a much broader impact. The federal government is better positioned than the states to appreciate the national and international consequences of certain law enforcement actions. And it is the political branches—not the courts—that have the competence to set national and foreign policy.

B. Limiting Federal Power To Implement a Vague Category of Treaties Would Constrain the President's Ability To Negotiate an Ever-Changing Array of Important International Agreements

1. A new rule rendering the federal government powerless to implement treaties that touch on traditionally "local" behavior would impose significant and unworkable constraints on the President's negotiating power. The President needs flexibility in the negotiation of treaties. That is why the Constitution's broad language provides the President maximum leverage and reflects the "concern for uniformity in this country's dealings with foreign nations that animated the Constitution's allocation of the foreign relations power to the National Government." *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 413 (2003) (quotation omitted); *see* Edward T. Swaine, *Negotiating Federalism: State Bargaining and the Dormant Treaty Power*, 49 Duke L. J. 1127, 1201-1202 (2000) (describing the Founders' "overwhelming consensus on the need to maximize U.S. leverage through unified, centralized treaty negotiations").

To use this leverage in negotiations, the President and his representatives must not approach the bargaining table with their hands tied. See The Federalist No. 64, at 189 (J. Jay) (Roy P. Fairfield ed., 1981) (explaining that broad presidential treaty power would "tend to facilitate the attainment of the objects of the negotiation"). As in any negotiation, perceived constraints on a party's bargaining power limit that party's ability to optimize its outcome.

Many factors influence a negotiator's leverage. For instance, a nation's reputation for compliance based on past actions affects its bargaining position When a

state with a history of compliance problems "seeks to enter into agreements in the future, its potential partners will take into accou· the risk that the agreement will be violated, and will be less willing to offer concessions . . . . If the. ɔ is enough suspicion, potential partners may simply refuse to deal with the state." Andrew T. Guzman, *The Design of International Agreements*, 16 Eur. J. Int'l L. 579, 596 (2005).

Perceived constraints can diminish U.S. bargaining power in other ways as well. For example, potential treaty partners occasionally have asked for additional assurances from the United States to compensate for fears that the federal structure of the U.S. government will complicate treaty implementation. *See* Brian R. Opeskin, *International Law and Federal States*, *in* International Law and Australian Federalism 1, 3 (Brian R. Opeskin & Donald R. Rothwell eds., 1997). At times, these fears may prove insurmountable and derail negotiations. *See* Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403, 442, 478 (2003).

Other nations closely monitor legal developments in the United States relating to treaty implementation, including the efforts of the President and Senate to account for federalism concerns during negotiation and advice and consent. *See infra* Part II. Treaty partners also follow U.S. judicial decisions affecting U.S. treaty obligations, such as the decision of this Court in *Medellin*.

This Court should not impose a new rule that feeds foreign perceptions that the federal government cannot enforce U.S. treaty obligations. The resulting uncertainty could severely undercut the U.S. bargaining position on the international stage.

2. The President must maintain flexibility to negotiate treaties on a broad range of subjects. The Constitution envisions a treaty power capable of addressing diverse and unforeseeable international problems. *See* 3 The Debates in the several State Conventions on the Adoption of the Federal Constitution as Recommended by the General Convention at Philadelphia in 1787, 514 (Jonathan Elliot ed., 1891) (J. Madison) ("I do not think it possible to enumerate all the cases in which such external regulations would be necessary."). The President must have flexibility commensurate with that of treaty negotiating partners and not be singularly hamstrung when entering into international agreements. As the Court stated in *Holland*, "it is not lightly to be assumed that, in matters requiring national action, a power which must belong to and somewhere reside in every civilized government is not to be found." 252 U.S. at 433 (citation and internal quotation omitted).

Preserving the President's flexibility is especially important given the dynamic scope and substance of treaties. The Framers understood that treaties could affect domestic issues involving local matters—indeed, the early nation's inability to ensure treaty compliance animated the Article II treaty power and the Supremacy Clause. *See* Res. Br. 29-30. Over time, treaties have come to play an even broader role in domestic law. Modern treaties establish limits on air pollutants, *see* Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. Treaty Doc. No. 100-10, 1522 U.N.T.S. 29; create reciprocal protections for foreign investors, *see* Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S. Arg., Nov. 14, 1991, S. Treaty Doc. No. 103-2 (1993); establish rules governing the recognition of foreign driver's licenses, *see* Convention

on Road Traffic, art. 24(1), Sept. 19, 1949, 3 U.S.T. 3008, 125 U.N.T.S. 22; regulate the treatment of endangered species, *see* Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243; and combat dangerous crime syndicates, *see* U.N. Convention Against Transnational Organized Crime (2005), Nov. 15, 2000, 2237 U.N.T.S. 343.

The role that treaties play in U.S. foreign relations and domestic law will continue to evolve as the country encounters new challenges. A vague "local" or "federalism" limit on the treaty power could severely limit the United States' ability to meet such challenges.

3. Congress has rejected the constitutional limitation petitioner seeks precisely because of the drastic effects that the limitation would have on the President's treaty power and conduct of foreign policy. In the 1950s, Senator John Bricker proposed an amendment to the Constitution providing that "[a] treaty shall become effective as internal law in the United States only through legislation which would be valid in the absence of a treaty." Duane Tananbaum, The Bricker Amendment Controversy, A Test of Eisenhower's Political Leadership 91-92 (1988). Proponents of the amendment were motivated, along the same lines as petitioner, by fears that treaties would extend to local laws regulating "all education, including public and parochial schools[,]. . . all matters affecting civil rights, marriage, divorce, etc, [and] all our sources of production of foods and the products of the farms and factories." Frank E. Holman, The Story of the "Bricker Amendment" 38 (1954).

President Eisenhower vehemently opposed the "Bricker Amendment" and related proposals, on the

ground that such a limitation "*would work to the disadvantage of our country, particularly in making it impossible for the President to work with the flexibility that he needs in th[e] highly complicated and difficult*" world of foreign affairs. Dwight D. Eisenhower, *The President's News Conference of March 26, 1953*, Public Papers of the Presidents of the United States: Dwight D. Eisenhower, 1953, 132 (U.S. Gov't Printing Office, 1954) (emphasis added). He further warned that the proposals would "shackle the federal government so that it is no longer sovereign in foreign affairs." Letter from President Eisenhower to Majority Leader Knowland (Jan. 25, 1954) cited *in* "Foreign Policy," Congressional Quarterly Almanac 10 (1954). In light of these concerns, the Bricker Amendment never made it out of the Senate.

This Court should not read into the Constitution what would effectively be an amendment that was already considered and rejected by the political branches.

II. ADDITIONAL RESTRICTIONS ON THE POWER TO MAKE AND IMPLEMENT TREATIES ARE NOT NECESSARY TO PROTECT FEDERALISM

Petitioner argues that "absent meaningful limits" on Congress's implementation power, "nothing would stop Congress from invoking treaties to override large swathes of state and local law." Pet. Br. 38. Petitioner's assertion—which is unsupported by two hundred years of experience—is intended to scare the Court into limiting the treaty power in a way that is neither necessary nor appropriate. The President and Senate follow a careful process to make treaties that protect domestic interests, including federalism.

Through this process, the federal government successfully has maintained an appropriate federal-state balance.

A. The Executive Branch, in Consultation with the Senate, Employs a Rigorous Process to Negotiate and Join Treaties that Benefit the United States and Protect Domestic Interests

1. Treaties are "the supreme Law of the Land," U.S. Const. art. VI, cl. 2, and a significant undertaking in international law. As such, the treaty-making process involves numerous checks on a treaty's potential political, practical, and legal impact. These checks most notably include, but are not limited to, the need for the advice and consent of two-thirds of the U.S. Senate—a requirement specifically designed to account for our federal structure of government.

Within the Executive Branch, treaty-making must follow a rigorous vetting process. A critical part of this process is the formal procedure established by the State Department's Circular 175 ("C-175"). C-175 "facilitates the application of orderly and uniform measures to the negotiation, conclusion, reporting, [and] publication" of treaties. *Guidelines for Concluding International Agreements*, 11 Foreign Affairs Manual § 721 (2006).

Through the C-175 process, the State Department must authorize both the negotiation and the signing of a treaty. Neither the negotiation nor the signing of a treaty can be authorized by the Secretary of State without a comprehensive legal memorandum addressing all legal and political issues associated with the proposed treaty. *See* 11 Foreign Affairs Manual

§§ 724.3(h), 731.2-1. This process ensures that negotiators appreciate the full range of consequences from their actions.

In its review process, the State Department coordinates with other concerned federal agencies. For example, the State Department works closely with the Department of Defense on arms control treaties and the Department of Justice on treaties that carry criminal law requirements, as the Chemical Weapons Convention does.

Although it is the President who "alone negotiates" international agreements, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936), the executive branch, as a matter of sound practice, consults with the Senate throughout the negotiation process. Consultation occurs through regular briefings of Senate staff, and sometimes Senators themselves, by the Legal Adviser's Office or others in the executive branch. This interactive process allows Senators to share concerns about a treaty's potential impact on domestic law generally or on their states in particular.

U.S. negotiators bear in mind existing domestic law and whether any difficult changes or additions to domestic law will be necessary to implement a treaty. If federal implementing legislation will be required, as would typically be the case where criminalization is part of a treaty, the implementing legislation itself is often developed long before ratification. Indeed, the State Department has a policy of not ratifying a treaty unless existing U.S. law is sufficient to implement the treaty or until appropriate implementing legislation is enacted.

2. Once a treaty is signed, the State Department conducts another review and determines whether to recommend that the treaty be submitted by the President to the Senate for advice and consent. All concerned executive branch departments, including the Justice Department, have an opportunity to review the signed treaty, raise any issues regarding its scope, and assess whether any implementing legislation will be needed before the U.S. can become a party. Working with others in the U.S. Government, the Legal Adviser's Office prepares a detailed article-by-article analysis of the treaty for the President and for transmittal to the Senate.

During this process, the Legal Adviser's Office recommends whether the United States should include with its instrument of ratification any reservations, understandings, or declarations ("RUDs"). Reservations are formal legal caveats that modify a party's international legal obligations. *See* Vienna Convention of the Law of Treaties (VCLT) arts. 2, 19-23, Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679 (United States Notes). "Understandings are interpretive statements that clarify or elaborate provisions but do not alter them." Treaties and Other International Agreements: The Role of the United States Senate, S. Prt. No. 106-71, at 11 (2001). Declarations state a Party's position on general matters rather than on specific provisions and, like understandings, may set forth how the federal government intends to implement a treaty. In addition to RUDs, Provisos—which are not included in the final instruments of ratification provided to treaty partners—may clarify the United States' position on an issue for domestic purposes.

If and when a treaty will be transmitted to the Senate is left entirely to the President. The President may transmit a treaty, along with a transmittal package containing the executive branch's analysis of the treaty, shortly after submission to him by the Secretary of State. He may postpone transmittal for several years. Or he may even decide not to transmit it at all.

3. Once transmitted to the Senate, treaties receive extensive review. A supermajority of the Senate may approve a treaty "as written, approve it with conditions, reject and return it, or prevent its entry into force by withholding approval." Treaties and Other International Agreements, S. Prt. No. 106-71, at 3.

A treaty submitted by the President to the Senate is a public document and is referred to the Senate Foreign Relations Committee for action. The Committee carefully considers the treaty's legal and policy implications. *See* Senate Rule XXV. The Committee reviews the President's transmittal package, receives briefings from the State Department and other agencies, holds one or more hearings with expert witnesses from the President's Administration or elsewhere, and submits formal "questions for the record" to hearing witnesses or other Administration officials.

When the Committee is prepared to recommend that the full Senate consider a treaty, it develops a Resolution of Advice and Consent. The Resolution may include additional RUDs as a condition to ratification. Those RUDs may undergo further changes when before the full Senate. Although the Senate considers RUDs and amendments by simple majority, the final determination of advice and consent—

whether to approve, reject, or seek modification of the treaty—may be made only by a two-thirds supermajority vote. *See* U.S. Const. art. II, § 2, cl. 2.

If a treaty receives advice and consent, the Senate returns it to the President, who makes the final decision whether the United States will ratify it. The President may not remove RUDs added by the Senate. Furthermore, the Legal Adviser's Office will not concur in the exchange or deposit of the instruments of ratification "until it has determined U.S. domestic law comports with whatever international law obligations the treaty imposes." Duncan B. Hollis, *Treaties—A Cinderella Story*, 102 Am. Soc'y Int'l L. Proc. 412, 413 (2008).

Once ratified, a treaty binds the United States as a matter of international law. *See* VCLT art. 16, 1155 U.N.T.S. 331. With respect to domestic law, some treaties are self-executing and some are not. The provisions of self-executing treaties are judicially enforceable upon ratification. Non-self-executing treaties, on the other hand, require either existing or new legislation to be judicially enforceable in the U.S. For example, implementation of the Chemical Weapons Convention depended on domestic criminal laws prohibiting certain conduct. In the case of the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, the federal government formulated implementing legislation prior to ratification, and the Convention's instrument of ratification was deposited only after the legislation went into effect. 136 Cong. Rec. S17,486-01 (daily ed. Oct. 27, 1990); *see* Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 463 (1994) (codified at 18 U.S.C.

§§ 2340, 2340A). When new laws are required, the President or Congress proposes implementing legislation, which both houses of Congress must pass and the President must sign through the ordinary legislative process.

4. The judiciary, of course, also may serve as a check on the abuse of treaty power. The judiciary may review implementing legislation and narrowly construe or even strike down legislation that is not necessary and proper to implement a treaty that has been ratified by the United States.

B. The Federal Government Exercises the Treaty Power with Full Regard for the Laws and Interests of the States

1. The new "meaningful limits" that petitioner asks this Court to impose on the treaty power are wholly unnecessary. The executive and legislative branches already undertake great efforts to account for domestic laws and policies—including federalism—throughout the treaty-making and implementation process.

As discussed, the State Department's approval process requires that all relevant legal issues be considered. *See supra* Part II.A.1; *see also* 11 Foreign Affairs Manual §§ 722(1), 723.2-1. These considerations guide the negotiating process and may cause negotiators to avoid politically sensitive subject areas or alter potential treaty terms. For instance, the executive branch may decide to draft treaty terms in a way that minimizes federalism concerns, especially where doing so will help secure the two-thirds vote of the Senate required for advice and consent. *See, e.g.*, Letter of Transmittal of Pres. Harry S. Truman, Convention on Road Traffic, May 3, 1950 (discussing

how the Convention on Road Traffic "makes allowance for the Federal-state relationship" through use of the phrase "a Contracting State or subdivision thereof").

2. A President's proposed reservations, understandings, and declarations are another way to address domestic issues, such as federalism. For example, when transmitting to the Senate the United Nations Convention Against Corruption (2006), Dec. 14, 2005, 2349 U.N.T.S. 145, and the U.N. Convention Against Transnational Organized Crime (2005), Nov. 15, 2000, 2237 U.N.T.S. 343, the President attached a proposed reservation regarding the "fundamental principles of federalism, pursuant to which both federal and state criminal laws must be considered in relation to conduct addressed in the Convention." *See* 152 Cong. Rec. S8971 (daily ed. Sept. 5, 2006); 151 Cong. Rec. S9644 (daily ed. Aug. 31, 2005).

Even if neither the President nor the Foreign Relations Committee includes any conditions based on constitutional issues, the full Senate might nonetheless insist that an issue be addressed. For example, declarations stating that "there is no intention to change State law and practice by Federal action through ratification" allowed certain international labor conventions to obtain the required two-thirds approval of the Senate. *See* 134 Cong. Rec. S324 (daily ed. Feb 1, 1988). Another instance of the Senate's ability to give conditional advice and consent is Condition 28 to the Chemical Weapons Convention. That condition ensures that Fourth Amendment protections apply to searches that the Convention may require. *See* 143 Cong. Rec. S3486 (daily ed. Apr. 23, 1997)

3. Most major multilateral treaties receive the Senate's supermajority approval with at least some

conditions. Of the forty multilateral treaties that the President transmitted to the Senate from 1993 to 2000, the Senate approved 31, and only seven of those did not include conditions. *See* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan. L. Rev. 1963, 1985-86 (2003). These figures reflect "the continuing effectiveness of the special procedural safeguards that the Framers created for treaty-making purposes—the two-thirds rule for Senate advice and consent." David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1278 n.695 (2000).

Of course, even with significant RUDs, the Senate still may decide not to approve a treaty out of a concern for federalism. Federalism objections have driven the Senate's decision not to provide advice and consent to ratification of the Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448. Indeed, the last treaty the Senate considered, the United Nations Convention on the Rights of Persons with Disabilities, Mar. 30, 2007, 189 U.N.T.S. 137, failed to secure advice and consent due in large measure to concerns among some members of the Senate that the treaty would infringe on issues of local concern. Thus, as a matter of both constitutional design and practice, the Senate serves as a "guardian of state interests." Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 548 (1954); *see* The Federalist No. 62, at 183 (J. Madison) (Roy P. Fairfield ed., 1981) (describing the Senate as "a constitutional recognition of the portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty").

4. Finally, the need to implement non-self-executing treaties through legislation provides the House of Representatives, as well as the Senate, with a further opportunity to consider federalism or any other issues that may arise with respect to the United States' fulfillment of its international obligations. In rare cases, Congress may even condition implementation of a treaty on certain actions by the states. *See, e.g.*, H.R. 1896, 113th Cong. (2013) (requiring amendments to state law in order to implement the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, S. Treaty Doc. No.110-21, 47 I.L.M. 257).

The treaty process is designed to take federalism concerns into consideration, from negotiation through implementation.

C. The Federal Government Must Maintain the Authority and Flexibility to Implement Treaties That Strike the Appropriate Federal-State Balance

1. The federal government has a strong and successful record of joining and implementing treaties in a manner that strikes an appropriate federal-state balance. While some treaties regulate conduct in areas governed exclusively at the federal level, other treaties touch conduct that is ordinarily governed by states but that may have national or international effect. The latter category includes conventions obligating the United States to establish a particular domestic penal regime as part of an international enforcement system—for example, the Chemical Weapons Convention, or the Convention Against Hostage Taking, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205, implemented through the Act for

the Prevention and Punishment of the Crime of Hostage-Taking, Pub. L. No. 98-473, Title II, § 2002(a), 98 Stat. 1837 (1984).

The United States is party to various multilateral treaties that require the states to take action on what may be deemed "local matters" in order for the U.S. to meet its international obligations. The Vienna Convention on Diplomatic Relations art. 31, Apr. 18, 1961, 23 U.S.T. 3227, T.I.A.S. No. 7502, 500 U.N.T.S. 95, codifies special privileges and immunities for diplomats, including preventing local law enforcement from arresting certain individuals for local offenses. In a similar vein, the Vienna Convention on Consular Relations requires state and local officials to inform foreign nationals of their right to have their consulate notified if they are detained or arrested. *See* VCCR art. 31.

Yet another example is the Convention on Road Traffic art. 24(1), Sept. 19, 1949, 3 U.S.T. 3008, 125 U.N.T.S. 22, which requires local and state officials to take certain actions with respect to driver's licenses—a matter traditionally left to the states. Specifically, the Road Traffic Convention requires parties to issue a driver's license to a person holding a license from another convention member, without an additional driver's test. If the individual states do not fulfill the obligations that the federal government assumed under these treaties, U.S. citizens could be denied reciprocal benefits.

Moreover, the United States is party to treaties intended to facilitate international cooperation through federal legislation that touches on certain matters traditionally governed by state law. For instance, the Hague Convention on Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670,

1343 U.N.T.S. 89, S. Treaty Doc. No. 99–11 (1988), establishes an international framework for the return of a child abducted from one contracting state to another. Congress implemented this convention through the International Child Abduction Remedies Act, which allows for local remedies but also establishes a federal cause of action for the return of an abducted child. 42 U.S.C. § 11603(a); *see Chafin v. Chafin*, 133 S. Ct. 1017, 1021-22 (2013). The international framework that the U.S. joined has yielded tangible benefits: As this Court noted, "324 children removed to or retained in other countries were returned to the United States under the Convention." *Id.* at 1022.

The Vienna Conventions on Dipolmatic and Consular Relations, the Road Traffic Convention, and the Child Abduction Convention touch on areas traditionally regulated by the states, but they also advance compelling national interests. Because these treaties are managed in a way that respects our federal system, they are widely accepted in the United States. *Accord* Oona A. Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239, 320 (2013). This Court should not adopt a new limit on federal power that would preclude the President from being able to pursue other treaties deemed to be in the national interest, such as the signed (but not yet ratified) Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, S. Treaty Doc. No. 110-21, or the Hague Convention on the Law Applicable to Trusts and on Their Recognition, Oct. 20, 1984, 23 I.L.M. 1388.

Establishing the nebulous rule petitioner seeks would prevent the federal government from addressing issues of national and international concern. The discrete prosecution in this case should not be an occasion to disrupt a carefully designed system that has effectively served the enduring interests of the United States.

CONCLUSION

This Court should not place additional and unnecessary restrictions on the federal treaty power.

Respectfully submitted,

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APPENDIX

APPENDIX

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AMICUS CURIAE BRIEF

No. 12-158

In The Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF FOR THE GOLDWATER INSTITUTE SCHARF-NORTON CENTER FOR CONSTITUTIONAL GOVERNMENT AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The Scharf-Norton Center for Constitutional Litigation is part of the Goldwater Institute, a tax exempt educational foundation under Section 501(c)(3) of the Internal Revenue Code. The Goldwater Institute was founded in 1988 to advance non-partisan public policies of limited government, economic freedom, and individual responsibility. The integrated mission of the Scharf-Norton Center for Constitutional Litigation is to preserve individual liberty by enforcing the provisions of the Arizona and federal Constitutions that directly and structurally protect individual rights, including the Bill of Rights, the doctrine of separation of powers and federalism. To ensure its independence, the Goldwater Institute neither seeks nor accepts government funds, and no single contributor may provide more than five percent of the Goldwater Institute's annual revenue on an ongoing basis.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amicus curiae and its counsel, made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The Third Circuit should be reversed because Congress does not have implied power to regulate entirely local matters under the authority of a Chemical Weapons Treaty. This conclusion results from this Court's repeated recognition that all powers of the federal government are limited by the principle of state sovereignty, which guarantees the States both structural autonomy and exclusive jurisdiction over entirely local matters. In view of this limitation, it is patently inconsistent with the letter and spirit of the Constitution for Congress to claim implied power to regulate entirely local matters to implement a treaty.

ARGUMENT

The overreach of the Chemical Weapons Convention Implementation Act, 18 U.S.C. § 229, is best illustrated by a footnote in the Third Circuit's decision: "The Act's breadth is certainly striking, seeing as it turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." *U.S. v. Bond*, 681 F.3d 149, 154 n.7 (3rd Cir. 2012). The congressional power grab at issue in this case obviously has nothing to do with a core exercise of the Treaty Power. Rather, this case involves the federal government somehow claiming implied power under a Chemical Weapons Treaty to intervene in entirely local matters.

Despite the lower court's decision, the reserved power of the states under our system of dual sovereignty is not so ephemeral as to yield to the Act. Federal regulation of kitchen cupboards and cleaning cabinets cannot arise by mere implication from a treaty that has nothing to do with such matters.

After all, Congress has no textual authority to implement treaties independently from its Article I enumerated powers. The Treaty Power is consigned by Article II of the Constitution to the Executive Branch, subject to being checked and balanced by the Senate. By being premised somehow on Congress' implied Article I power, the Act already rests upon a penumbra of power that is entirely an artifact of precedent, rather than first principles. *Compare Missouri v. Holland*, 252 U.S. 416 (1920), *with Prigg v. Pennsylvania*, 41 U.S. 539, 619 (1842) ("the power is nowhere in positive terms conferred upon [C]ongress to make laws to carry the stipulations of treaties into effect").

For this reason alone, the Third Circuit should have hesitated before yielding to the federal government's prosecution of Petitioner based on implied congressional power. In any event, whatever the source of Congress' supposed power to implement treaties, the background principles that animate our Constitution certainly compel the conclusion that Congress does not have implied power under a Chemical Weapons Treaty to regulate entirely intrastate domestic disputes.

THE THIRD CIRCUIT SHOULD BE REVERSED BECAUSE CONGRESS DOES NOT HAVE IMPLIED POWER TO EXERCISE JURISDICTION OVER ENTIRELY LOCAL DOMESTIC MATTERS BASED ON A CHEMICAL WEAPONS TREATY.

This Court ruled in *Alden v. Maine* that all federal powers are limited by the principle of state sovereignty as a background assumption of the Constitution. 527 U.S. 706, 713-14 (1999). In reaching this ruling, this Court reviewed a federal law that was cleverly drafted to force states to defend themselves from citizen's lawsuits for monetary damages in their own courts – instead of hauling the states into federal court, which would clearly violate the Eleventh Amendment. Despite the law's technical compliance with the literal text of the Eleventh Amendment, and colorable grounding in Congress' enumerated powers, the law would have denied the States one of the most basic attributes of sovereignty. In striking the law down, this Court underscored that the Constitution cannot be construed to threaten a viable system of dual sovereignty. Similarly, the Third Circuit's decision should be reversed because the Act cannot constitutionally apply to Ms. Bond.

The background principles of the Constitution preclude construing the Treaty Power as somehow

bestowing upon Congress the implied power to invade a field of law that is a basic attribute of state sovereignty, and, therefore, necessarily within the exclusive jurisdiction of the States. It should be recalled that the Act is not a core exercise of the Treaty Power. Its constitutionality hinges entirely upon it being swept within the scope of whatever implied congressional power may be associated with the Treaty Power as confirmed by the Necessary and Proper Clause. However, as illustrated by the cogent analysis of the Necessary and Proper Clause in *Nat'l Fed'n of Indep. Bus. v. Sebelius*, the scope of Congress' implied power under the Constitution is not unlimited. 132 S. Ct. 2566, 2591-92 (2012) (Roberts, J.). Rather, Congress' implied power conforms to basic principles of agency law. Robert G. Natelson, *Tempering the Commerce Power*, 68 Mont. L. Rev. 95, 99-102 (Winter 2007).

In agency law, a grant of "authority to do whatever acts or use whatever means are reasonably necessary and proper to the accomplishment of the purposes for which the agency was created" means that "an agent has implied authority to do that which the nature of the business would demand in its due and regular course." *Merrell v. Joe Bullard Oldsmobile, Inc.*, 529 So.2d 943, 947 (Ala. 1988). Thus, Congress' implied power should be regarded as circumscribed by the agency principle that the Constitution authorizes only those actions that the nature of our system of dual sovereignty would demand in

its due and regular course. In other words, it is limited by the "letter and spirit" of the Constitution. *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819); *see generally Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3167 (2010) (Breyer, J., dissenting).

The nature of our system of dual sovereignty precludes the notion that Congress has implied power to implement a Chemical Weapons Treaty by regulating intrastate domestic disputes. As underscored in Federalist No. 45, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain to the state governments are numerous and indefinite." (James Madison) (Gideon ed., 1818). The Constitution thereby established a system "of complete decentralization." Joseph Story, *Commentaries on the Constitution of the United States*, Vol. 1, 189, 195-97 (Little, Brown & Co. 1878).

In our system of complete decentralization, "States are not mere political subdivisions of the United States." *New York v. U.S.*, 505 U.S. 144, 161-66, 186 (1992). Rather, "[t]he States 'form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Alden*, 527 U.S. at 714 (citations omitted); *see also Printz v. U.S.*, 521 U.S. 898, 918-19 (1997) ("Although the States surrendered

many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.' This is reflected throughout the Constitution's text . . . ") (citing U.S. Const. art. I, § 4 (granting power to state legislatures over congressional elections); *id.* art. IV, § 4 (guaranteeing states a republican form of government); *id.* art. V (incorporating states into the amendment process); *id.* amend. X (reserving to states powers not delegated); *id.* amend. XI (making states immune to suit in federal court)). Such decentralization necessarily includes the reservation of an exclusive field of law to the States consisting of those matters that are entirely local, such as domestic disputes involving pescacide.

After all, the States would be transformed into nothing more than glorified student governments if the federal government were prohibited from "commandeering" their political structures, but could otherwise occupy the entire field of local substantive law within a state's jurisdiction. By its nature, the political system established by the Constitution cannot countenance such a concentration of power in the federal government. As explained by Thomas Jefferson,

> The way to have good and safe governments is not to trust all to one, but to divide it among the many, distributing to everyone exactly the functions he is competent to. Let the national government be entrusted with the defence [sic] of the nation and its foreign

> and federal relations; the state governments with the civil rights, laws, police and administration of what concerns the state generally. . . . What has destroyed liberty and the rights of man in every government which has ever existed under the sun? The generalizing and concentrating all cares and powers into one body, no matter whether of the autocrats of Russia or of France or of the aristocrats of a Venetian Senate.

Letter from Thomas Jefferson to Joseph C. Cabell (May 1816), in The Jeffersonian Cyclopedia 131 (J. Foley 1900). This basic principle of state sovereignty stands against Congress claiming implied power under a Chemical Weapons Treaty to regulate an entirely intrastate domestic dispute. *U.S. v. Lopez*, 514 U.S. 549, 577 (1995) ("Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory.").

CONCLUSION

This brief is being finalized shortly after reports that the State Department cited international agreements to shut down a website that distributed information about how to build a useless plastic gun. The Guardian, *State Department Orders Firm to Remove 3D-Printed Guns Web Blueprints*, http://www.guardian.co.uk/technology/2013/may/09/3d-printed-guns-plans-state-department (May 10, 2013). The censored information did not involve an incitement to violence or the equivalent of yelling fire in a theater. It was being distributed to make an adolescent statement about the absurdity of federal gun control. Such censorship is but a small taste of what the future holds if the Third Circuit's decision is not reversed.

If legislative implementation of an otherwise valid treaty is unbound by the Tenth Amendment, there is no principled argument to stop the federal government from displacing any other constitutional guarantee or structure through the combination of international agreement and legislation. This is because the vertical separation of powers is not a second class constitutional protection.

Our system of dual sovereignty is just as essential to protecting liberty as the Constitution's horizontal separation of powers and its affirmative guarantees of individual liberty. These features are interlocking components of an overall mechanism that cannot function as designed without each component maintaining its integrity. A threat to one is a

threat to all. That is why a bright line must be drawn at the threshold of kitchen cupboards, cleaning cabinets, and fishbowls when it comes to Congress' supposed implied power under a Chemical Weapons Treaty.

Respectfully submitted,

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May 14, 2013

AMICUS CURIAE BRIEF

No. 12-158

In the Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PROFESSORS DAVID M. GOLOVE, MARTIN S. LEDERMAN AND JOHN MIKHAIL AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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United States v. *Comstock*,
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United States v. *Samples*,
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Convention for the Protection of Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702 (1916) 5

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Descrition, S. Treaty Doc., No. 21, 103d Cong., 1st Sess. (1993) ..... *passim*

Treaty of Amity, Commerce and Navigation, U.S.-Gr. Brit. (Jay Treaty), Nov. 19, 1794, 8 Stat. 116 ..... 10, 11

Treaty of Peace Between the United States of America and the Kingdom of Spain, 30 Stat. 1754 (1898) 16, 18

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Act of Aug. 12, 1848,
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Act of Mar. 3, 1881,
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Act of June 6, 1900,
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18 U.S.C
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Chandler P. Anderson, *Extent and Limitations of the Treaty-Making Power under the Constitution*, 1 Am. J. Int'l L. 636 (1907)..... 18

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Charles Henry Butler, THE TREATY-MAKING POWER OF THE UNITED STATES (1902)..... 18

10 Cong. Rec. (1880)..... 15

23 Cong. Rec. (1892)..... 13, 14

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Edward Corwin, NATIONAL SUPREMACY—TREATY POWER V. STATE POWER (1913) 18, 33

The Federalist (C. Rossiter ed. 1961) 9, 27

Jean Galbraith, *Congress's Treaty-Implementing Power In Historical Practice*, http://papers.ssrn.com/sol3/papers.cfm?-abstract_id=2275355 (June 2013) 10

David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932 (2010) 9

David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) 9, 10

H.R. Rep. No. 561, 46th Cong., 2d Sess. (1880) 14, 15

John Mikhail, *The Necessary and Proper Clauses*, ___ Geo. L.J. ___ (forthcoming 2014) 27

Report on the Virginia Resolutions at the Session of 1799-1800 (J. Madison), in Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS (1836) 11

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Zvi S. Rosen, *In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law*, 83 St. John's L. Rev. 827 (2009) 15

S. Rep. 392, 56th Cong., 1st Sess. (1900) 14

Samuel T. Spear, THE LAW OF EXTRADITION, INTERNATIONAL AND INTER-STATE 69 (1879) 16

George Sutherland, CONSTITUTIONAL POWER AND WORLD AFFAIRS (1919)..... 9, 19

William Howard Taft, THE UNITED STATES AND PEACE 40-89 (1914) 12, 18-19

Henry St. George Tucker, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES § 113 (1915) 20

INTEREST OF THE *AMICI CURIAE*

Amici teach and write about constitutional law and have extensively studied the scope and history of the treaty power and Congress's authority under the Necessary and Proper Clause.[1] *Amici* are:

- David M. Golove, Hiller Family Foundation Professor of Law, New York University School of Law
- Martin S. Lederman, Associate Professor of Law, Georgetown University Law Center
- John Mikhail, Professor of Law, Georgetown University Law Center

SUMMARY OF ARGUMENT

The Chemical Weapons Convention (CWC) requires the United States to prohibit all persons within the United States from "us[ing]" chemical weapons, "including" by "enacting penal legislation with respect to such activity." CWC arts. I(1)(b), VII(1)(a), U.S. Br. App. 5a, 29a-30a. Because the Question Presented assumes the CWC is a "valid treaty," Pet. Br. i, the principal issue before the Court is whether Congress has the power to implement that treaty obligation by enacting a law categorically prohibiting the "use" of "chemical weapon[s]." 18 U.S.C. § 229(a)(1).[2]

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[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part and no person other than *amici* or their counsel made any monetary contribution to its preparation or submission.

[2] Petitioner argues that the CWC does not cover her particular use of toxic chemicals. Pet. Br. 52-53. We express no view on that question. But if the Court agrees with petitioner, then pe-

Missouri v. *Holland*, 252 U.S. 416 (1920), answers that question. The implementing statute in *Holland*, like the statute here, closely tracked the relevant provisions of a treaty obligation. Once this Court held that the treaty was valid, it followed that "there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." *Id.* at 43[illegible]

Petitioner is correct that *Holland* does not stand for the proposition that Congress may enact implementing legislation so "wildly 'out of proportion to'" the treaty "'that it cannot be understood as' a meaningful, let alone constitutional, effort to implement it." Pet. Br. 58 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 532 (1997)). The Necessary and Proper Clause, Art. I, § 8, cl. 18, is not a license for such grossly overbroad, self-evidently pretextual legislation.

This case, however, provides no occasion for the Court to decide how far Congress may go in implementing a valid treaty, because the relevant provisions of the federal statute here are narrowly tailored to—indeed, virtually coterminous with—the terms of the CWC itself.

Amici Cato Institute, *et al.*, unlike petitioner, contend that the Necessary and Proper Clause does not give Congress *any* authority to implement valid treaties. In their view, Congress' power to implement treaties therefore is strictly limited to legislation it could enact in the absence of the treaty under one of

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titioner's conduct would also fall outside the statutory prohibition, because Congress plainly intended to adopt in the statute the treaty's definition of "chemical weapon."

its other enumerated Article I authorities. *Amici* acknowledge that this would require overruling *Holland*.

This Court should decline *amici*'s invitation. Although *amici* characterize the holding in *Holland* as a "conclusory" bolt from the blue not warranting *stare decisis* deference, that holding was, in fact, deeply rooted in history and precedent. Indeed, the question of Congress's power to enact Necessary and Proper legislation to implement a valid treaty was settled and uncontroversial by 1920, reflecting a shared understanding of this Court, both political branches, and virtually all leading authorities, extending back to the founding.

Amici insist that *Holland* must nevertheless be mistaken, because it effectively affords the President and the Senate the power to "increase" or "expand" Congress's constitutional powers. But that circular argument simply ignores the Necessary and Proper Clause, whose very "nature" is to "empower[] Congress to enact laws in effectuation of * * * enumerated powers that are not within its authority to enact in isolation," *Gonzales v. Raich*, 545 U.S. 1, 39 (2005) (Scalia, J., concurring in the judgment), in order to enable the "beneficial execution" of the enumerated powers, *McCulloch v. Maryland*, 4 Wheat. 316, 415 (1819), and thus ensure that the federal government is not "incompetent to its great objects," *id.* at 418.

Amici also argue that their novel conception of congressional power is compelled by the Constitution's text. They read the Necessary and Proper Clause, in conjunction with the Treaty Clause, Art. II, § 2, cl. 2, to give Congress the authority to carry into execution only the *making* of treaties, not their implementation.

Even on this implausible theory, legislation designed to ensure compliance with treaty obligations would be necessary and proper, because the Nation's ability to make treaties would be severely compromised if the President were unable to assure treaty partners that the national government has the power to enforce its promises.

Moreover, the logic of *amici*'s approach would radically constrict the scope of Congress's authority to carry into execution all of the federal government's other enumerated powers, as well.

Finally, *amici* argue that *Holland* cannot be squared with Justice Black's admonition in *Reid* v. *Covert*, 354 U.S. 1, 16 (1957) (plurality opinion), that "no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." As Justice Black explained, however, that principle is perfectly consistent with, not contrary to, the Court's holding in *Holland*.

ARGUMENT

I. ALTHOUGH CONGRESS'S AUTHORITY TO IMPLEMENT A TREATY IS NOT UNLIMITED, THE STATUTE HERE IS NECESSARY AND PROPER UNDER *MISSOURI* v. *HOLLAND* BECAUSE IT CLOSELY TRACKS A TREATY OBLIGATION.

This case shares a critical feature with *Missouri* v. *Holland*: Congress has enacted a criminal prohibition that carefully tracks a treaty provision committing the Nation to prohibit specific conduct.

The treaty in *Holland* obligated the parties to establish certain "close seasons" during which hunting

of specified migratory birds would be prohibited. Convention for the Protection of Migratory Birds, U.S.-U.K., Aug. 16, 1916, 39 Stat. 1702-04 (1916). The implementing legislation, in turn, made it unlawful to hunt those birds "included in the terms of the convention," except during designated periods when hunting would be "compatible with the terms of the convention." Migratory Bird Treaty Act, ch. 128, §§ 2, 3, 8, 40 Stat. 755-56 (1918).

The statutory provisions at issue in this case likewise are "coextensive," Pet. App. 28-29 n.15, with the provisions of the CWC obligating the United States to prohibit categorically the "use" of "chemical weapons" within the United States. Compare 18 U.S.C. §§ 229(a)(1), 229F(1), (7), (8), with CWC arts. VII(1)(a), I(1)(b), II(1), (2), (9).

Holland squarely holds that where a treaty is valid, and where (as in *Holland* and here) the implementing language closely tracks the applicable language of the treaty itself, "there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. This is so, Justice Holmes explained for the Court, even if Congress would not have had the authority to enact the statute in the absence of the treaty. *Id.* at 433.

To be sure, "[t]he validity of [a] treaty does not guarantee the validity of actions taken to implement it." Pet. Br. 17. The legislature may not, for example, point to a valid treaty as justification for legislation grossly disproportionate to what is needed to satisfy the Nation's obligations or the conditions that enable the United States to reap the benefits of its side of the bargain. Such overreach would raise suspicion that Congress was using alleged treaty-

implementation as a "mere artifice," *United States* v. *Comstock*, 130 S. Ct. 1949, 1967 (2010) (Kennedy, J., concurring), to achieve domestic ends not otherwise within its powers, rather than for the maintenance of mutually beneficial international relations. The Necessary and Proper Clause is not a license for such self-evidently pretextual legislation. Nor does *Holland* suggest otherwise.

Noting that a statute cannot be so "wildly 'out of proportion to'" the treaty "'that it cannot be understood as' a meaningful, let alone constitutional, effort to implement it," Pet. Br. 58 (quoting *City of Boerne*, 521 U.S. at 532), petitioner queries whether the result in *Holland* would have been the same had Congress prohibited the killing of "all birds," rather than only the migratory birds identified in the treaty. Pet. Br. 29. The answer is not obvious, because it is well-established that Congress may go beyond what is "indispensably necessary to give effect to a specified power," *Fisher v. United States*, 2 Cranch 358, 396 (1805), and may, in particular, enact reasonable prophylactic legislation in order to deal with practical difficulties of implementation.[3]

Here, however, the Court does not confront a statute that goes beyond the treaty's language, let alone one that veers far, and dubiously, beyond the scope of the treaty obligation. Because Section 229(a)(1) is a narrowly tailored means—indeed, the most direct, natural manner—of implementing the CWC treaty obligation, this Court need not "pile inference upon inference," *United States* v. *Lopez*, 514

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[3] See, *e.g.*, *Raich*, 545 U.S. at 22; *Ruppert* v. *Caffey*, 251 U.S. 264, 297-300 (1920); *United States* v. *Coombs*, 12 Pet. 72, 81-83 (1838).

U.S. 549, 567 (1995), in order to conclude that the statute is genuinely and reasonably designed to ensure the United States' compliance with the CWC.

Plainly, Congress did not enact Section 229(a)(1) as a "pretext" for "the accomplishment of objects not entrusted to the [federal] government." *McCulloch*, 4 Wheat. at 423. And petitioner does not suggest otherwise.

Petitioner argues that facially valid legislation implementing a valid treaty should nevertheless be deemed unconstitutional "as applied" in cases where a court determines that the particular conduct at issue—although encompassed by the treaty—lacks a sufficient "nexus to a matter of national or international importance." Pet. Br. 29. As the government explains, U.S. Br. 49-52, there is no warrant in history or logic to introduce such an unmanageable case-by-case test, which would potentially put the United States in breach of its international obligations.

Furthermore, petitioner's as-applied argument appears to be premised on an assumption that certain domestic matters are somehow presumptively outside the domain of genuine matters of "international importance." The well-being of persons in other nations, however, has long been a central foreign policy concern of many nations, including the United States, for manifest economic, diplomatic, security, and humanitarian reasons. See, *e.g.*, *Agency for Int'l Development* v. *Alliance for Open Society Int'l*, 133 S. Ct. 2321, 2324 (2013) (describing "comprehensive" U.S. strategy to combat the spread of HIV/AIDS around the world). Indeed, petitioner herself appears to recognize that purely domestic uses of toxic chemicals can be of genuine "international importance," since she concedes that § 229(a)(1) would be constitu-

tional as applied to cases in which such domestic use "threatens widespread injury," Pet. Br. 47, or "induce[s] fear in a civilian population," *id.* at 59.

In sum, Section 229(a)(1) is facially valid implementing legislation, and the Court should decline petitioner's invitation to create a novel, judicially-managed as-applied exception that would threaten to undermine the Nation's treaty commitments. Cf. *Raich*, 545 U.S. at 26-33.

II. THERE IS NO REASON FOR THE COURT TO CONSIDER OVERRULING *HOLLAND*'S NECESSARY AND PROPER HOLDING.

In contrast to petitioner, *see* Pet. Br. 35, 57, the Cato *amici* argue that the Necessary and Proper Clause does not give Congress *any* authority to pass laws to implement valid treaties, and that the Court therefore should overrule *Holland*. *Amici* offer no sound reason the Court should take that radical step.

A. *Holland* Confirmed Longstanding Historical Practice and Authority.

On *amici*'s telling, this Court's holding in *Holland* concerning Congress's power to implement treaties does not deserve the deference of *stare decisis* because it consists of a "conclusory sentence," shorn of any "reasoning [or] citation." Cato Br. 4; see also Pet. Br. 28 ("only * * * an afterthought").

The Court's treatment of the question was succinct, however, because the issue was clearly settled. The only substantial controversy at the time of *Holland* concerned the scope of the President's power to make treaties—the principal topic of Justice Holmes's opinion. Congress's power to enact legislation to implement a valid treaty, by contrast, had

been widely accepted since the founding, and this Court had unanimously affirmed it in 1901.

1. Early Understandings.

Under the Articles of Confederation, the Union had to rely upon the states to implement its international treaty commitments, with disastrous results. "The imbecility of our Government even forbids [foreign nations] to treat with us," Hamilton lamented. "Our ambassadors abroad are the mere pageants of mimic sovereignty." *The Federalist* No. 15, at 107 (C. Rossiter ed. 1961); see also U.S. Br. 30-32; David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1131 (2000). To allow such a state of affairs to continue would "sap the sovereignty of the Nation and render it contemptible in the sight of all other nations. The anomaly of a sovereignty with power to promise but none to perform could not endure." 1 George Sutherland, CONSTITUTIONAL POWER AND WORLD AFFAIRS 159 (1919).

One of the principal goals of the new Constitution was therefore to ensure that the new nation would be fully capable of making good on its international commitments. See generally David M. Golove & Daniel J. Hulsebosch, *A Civilized Nation: The Early American Constitution, the Law of Nations, and the Pursuit of International Recognition*, 85 N.Y.U. L. Rev. 932 (2010).

In the first decades after the founding, the Nation's promises were enforced primarily through self-executing treaties, which operated without legislation to establish judicially enforceable federal norms, including in areas that Congress could not have reg-

ulated under its Article I powers—a proposition neither petitioner nor *amici* contest. These treaties frequently intruded into areas at the core of the states' police powers.[4]

It therefore stands to reason that the national government could accomplish the same result through legislation implementing a valid treaty. After all, if the President and Senate by treaty *alone* can directly regulate subjects falling outside the scope of Congress' enumerated powers, then surely the Constitution does not prohibit the President and Senate from including the House of Representatives—the most representative branch—as an additional check against treaty-based intrusions on state prerogatives.

Not surprisingly, that was the common understanding from the founding. As early as the great debate over the Jay Treaty in 1796, and repeatedly thereafter, members of Congress who opposed the idea that treaties can be self-executing pointed to the Necessary and Proper Clause as proof that the Constitution contemplated congressional involvement in the implementation of treaties. See Jean Galbraith, *Congress's Treaty-Implementing Power In Historical Practice*, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2275355 (June 2013), at 18-26.

The assumption that Congress could exercise this authority even when the treaty dealt with an issue outside Congress's enumerated powers was reflected in the high-profile congressional debate involving the Jonathan Robbins affair in 1799-1800.

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[4] See generally Golove, *supra*, 98 Mich. L. Rev. at 1115-27, 1157-93, 1212-17.

President Adams deemed Article 27 of the Jay Treaty self-executing and, with the aid of a federal judge, extradited Robbins, who claimed to be a U.S. citizen, to Great Britain. See *United States* v. *Robins* [*sic*], 27 F. Cas. 825 (D.S.C. 1799) (No. 16-175).

Republicans fiercely criticized Adams for acting in the absence of implementing legislation creating an extradition process, 10 Annals of Cong. 614-15 (1800) (remarks of Rep. Marshall, summarizing Republican position), and even introduced a bill to implement the treaty's extradition article, *id.* at 511 (remarks of Rep. Livingston); see also *id.* at 654-55, 691 (describing debate). Notably, this occurred notwithstanding the Republicans' assertion in the virtually simultaneous debate over the Alien and Sedition Acts that Congress's enumerated powers did *not* authorize legislation for the deportation of "friendly" aliens, much less U.S. citizens. See Report on the Virginia Resolutions at the Session of 1799–1800 (J. Madison), *in* 4 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS 546, 554-59 (1836). Despite the absence of an Article I enumerated power over the subject, members of Congress on both sides of the Robbins debate assumed Congress's authority to enact extradition legislation that would implement a valid treaty.

*2. Pre-*Holland *Practice and Precedent.*

As time went on, the need for implementing legislation arose in connection with a number of important treaties. Proponents and opponents alike concurred that, even when there was no other source of congressional authority, the Necessary and Proper Clause empowered Congress to enact such laws where the treaty provisions themselves were valid.

a. *Federal Legislation to Criminalize Violence Against Aliens.*

The most extensive treatment of the issue came in response to a pattern of mob violence against resident aliens entitled to protection under various treaties. Although state laws prohibited such violence, the states regularly failed to indict, prosecute or convict malefactors, provoking a series of diplomatic conflicts with our treaty partners. See William Howard Taft, THE UNITED STATES AND PEACE 40-89 (1914).

This Court had held in *United States* v. *Harris*, 106 U.S. 629 (1883), that Congress lacked the power to enact a statute providing federal penalties for private acts of racial violence. In 1886, however, a circuit court specifically relied upon Congress's Necessary and Proper Clause power to implement valid treaties in order to uphold a conviction under that statute for crimes against treaty-protected Chinese residents. *In re Baldwin*, 27 F. 187, 188-91 (D. Cal. 1886).

In *Baldwin* v. *Franks*, 120 U.S. 678 (1887), this Court reversed the judgment on the ground that the application in question could not be severed from the facially invalid statute. The Court was at pains, however, to explain that Congress was not powerless to address the problem in light of the treaty with China: "That the United States have power under the Constitution to provide for the punishment of those who are guilty of depriving Chinese subjects of any of the rights, privileges, immunities, or exemptions guaranteed to them by this treaty we do not doubt." *Id.* at 683.

Encouraged by the Court's unambiguous signal in *Baldwin*, Presidents from Benjamin Harrison to William Taft repeatedly urged Congress to adopt legislation to prohibit violence against treaty-protected aliens, to bring to an end increasingly serious diplomatic embarrassments.

In the extensive legislative debates that followed, opponents raised an array of constitutional and policy-based objections, including, in some cases, doubts about the constitutionality of the treaties themselves. They also inveighed that the legislation "proposes to take away from the States the exclusive and sole jurisdiction which they have, as States and colonies, for two hundred and fifty years exercised over crimes and criminals within their jurisdiction, and to divide it partly with the Federal Government." 23 Cong. Rec. 4606 (1892) (remarks of Sen. Turpie).

All sides agreed, however, that Congress was empowered to pass laws necessary to implement valid treaty commitments. See, *e.g.*, *id.* at 4558 (remarks of principal proponent Sen. Morgan) (noting, immediately after denying any other congressional power over the subject, that the treaty power "gives unquestionable power to Congress to do those things which are necessary to be done to carry into execution those treaties with foreign governments which may be executed and ratified in conformity with the Constitution of the United States"); *id.* at 4554 (remarks of Sen. Vilas) (opponent); see also *id.* at 4557 (remarks of Sen. Davis) (proponent); *id.* at 4607 (remarks of Sen. Hiscock) (proponent); *id.* at 4552 (remarks of Sen. Palmer) (opponent); *id.* at 4605 (remarks of Sen. Turpie) (opponent); S. Rep. 392, 56th Cong., 1st Sess., at 4 (1900).

Despite this agreement on Congress's treaty-implementing power, opposition to adoption of a federal anti-lynching law, even if applicable only to treaty-protected aliens, prevented Congress from acting.

b. *Federal Trademark Legislation.*

In the *Trade-mark Cases*, 100 U.S. 82 (1879), this Court held that the Intellectual Property Clause, Art. I, § 8, cl. 8, did not authorize the 1870 Trademark Act. The Court virtually invited Congress, however, to adopt legislation to implement the growing number of trademark treaties the President and Senate had concluded: "In what we have here said we wish to be understood as leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect." *Id.* at 99.

Congress soon took up the Court's suggestion. The House Judiciary Committee recommended trademark legislation specifically tailored to implement treaties, despite its view that Congress otherwise lacked the power to enact such laws:

> [W]hile we think Congress cannot so legislate with regard to trade-marks under the power "to regulate commerce with foreign nations, and among the several States and with the Indian tribes," * * * trade-marks, in commerce with foreign nations and with the Indian tribes, can be protected under the treaty-making power. * * * If [treaties] need legislative aid, Congress can give it under its power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers

> vested by the Constitution in the Government of the United States, or in any department of officer thereof."

H.R. Rep. No. 561, 46th Cong., 2d Sess., at 6 (1880) (emphasis and internal citations omitted).

Although state common law already protected trademarks, see *ibid.*, proponents stressed the need for federal legislation because of "the importance of maintaining not only every treaty obligation of the United States, but of doing so in such manner as to keep the confidence of the world." 10 Cong. Rec. 2703-04 (1880) (remarks of Rep. Hammond); see also, *e.g.*, *id.* at 2806 (remarks of Rep. Lapham).

Congress enacted the legislation in 1881, Act of Mar. 3, 1881, ch. 138, 21 Stat. 502, and the law had its intended effect: Whereas no nation had entered into a trademark treaty with the United States in the two years since the Court's ruling in the *Trademark Cases*, the new law reassured foreign powers, four of which quickly concluded new agreements with the United States. See Zvi S. Rosen, *In Search of the Trade-Mark Cases: The Nascent Treaty Power and the Turbulent Origins of Federal Trademark Law*, 83 St. John's L. Rev. 827, 888-89 (2009).

c. *Extradition Legislation and* Neely.

None of Congress' enumerated powers in terms supports a general power to extradite. See, *e.g.*, *In re Kaine*, 14 How. 103, 136 (1852) (Nelson, J., dissenting on other grounds). Until well into the Twentieth Century, therefore, Congress avoided adopting extradition legislation—except in implementation of treaty commitments.

Early extradition treaties were self-executing. See *In re Metzger*, 5 How. 176, 188-89 (1847). When self-execution proved an inadequate basis to achieve efficient compliance, however, Congress acted to implement the treaties through supplemental legislation. See Samuel T. Spear, THE LAW OF EXTRADITION, INTERNATIONAL AND INTER-STATE 69 (1879).

The first such statute expressly provided that the duty to extradite was limited to "cases in which there now exists, or hereafter may exist, any treaty or convention for extradition between the government of the United States and any foreign government." Act of Aug. 12, 1848, ch. 167, § 1, 9 Stat. 302. See also pages 11-12, *supra* (discussing proposed legislation in connection with the Robbins Affair). By 1879, the leading treatise on extradition unequivocally affirmed that although Congress had no independent power to provide for extradition, the Necessary and Proper Clause provided authority for extradition legislation to implement treaties. See Spear, *supra*, at 7, 13.

A case challenging the constitutionality of an extradition statute prompted this Court, in *Neely* v. *Henkel*, 180 U.S. 109 (1901), to confirm unequivocally Congress's power to enact necessary and proper legislation to implement any valid treaty stipulation.

The Treaty of Paris, which ended the Spanish-American War, required the United States to assume "the obligations that may under international law result from the fact of its occupation [of Cuba], for the protection of life and property." Treaty of Peace Between the United States of America and the Kingdom of Spain, Art. I, 30 Stat. 1754, 1755. One year later, Congress amended the 1848 extradition act to provide that whenever a person was accused of speci-

fied offenses in territory occupied by the United States and thereafter fled to the United States, that person would be subject to extradition. Act of June 6, 1900, ch. 793, 31 Stat. 656.

Neely, seeking to avoid extradition to Cuba, challenged the constitutionality of this statute. Even though the Treaty of Paris did not in terms require the extradition legislation, Justice Harlan, writing for a unanimous Court, held that the statute was a necessary and proper means of implementing the treaty:

> The power of Congress to make all laws necessary and proper for carrying into execution as well the powers enumerated in § 8 of article I of the Constitution as all others vested in the government of the United States, or in any department or the officers thereof, includes the power to enact such legislation as is appropriate to give efficacy to *any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power*. What legislation by Congress could be more appropriate for the protection of life and property in Cuba, while occupied and controlled by the United States [as provided in the Treaty of Paris], than legislation securing the return to that island, to be tried by its constituted authorities, of those who, having committed crimes there, fled to this country to escape arrest, trial, and punishment?

180 U.S. at 121-22 (emphasis added). The Court explained that it was irrelevant whether any other Article I authority supported the law, for it was "quite

sufficient in this case to adjudge, as we now do, that it was competent for Congress, by legislation, to enforce or give efficacy to the provisions of the treaty made by the United States and Spain with respect to the island of Cuba." *Id.* at 122.

3. The Views of Constitutional Authorities

Reflecting this history, leading constitutional authorities—before *Holland*— agreed that the Necessary and Proper Clause empowers Congress to enact legislation implementing treaty obligations, without regard to whether that legislation is authorized by another Article I power.[5]

In addition to Professor Corwin's seminal, comprehensive, treatment, see note 5, *supra*, particularly notable were the views of two soon-to-be Supreme Court Justices—William Howard Taft and George Sutherland.

Former President Taft, writing before his appointment as Chief Justice, focused at length on the ongoing controversy over federal legislation to criminalize violence against treaty-protected aliens. Stressing the "'pusillanimous position'" of the federal government, which, having entered into treaty commitments, was forced to excuse its non-performance by claiming that state breaches were outside "'our control,'" Taft, *supra*, at 68, Taft specifically rejected the argument that such implementing legislation

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[5] See, *e.g.*, Sutherland, *supra*, at 153-55, 164-65; Taft, *supra*, at 67-68, 74-83; Edward Corwin, NATIONAL SUPREMACY—TREATY POWER V. STATE POWER 274-95 (1913); 2 Charles Henry Butler, THE TREATY-MAKING POWER OF THE UNITED STATES § 390, at 139-44 (1902); Chandler P. Anderson, *Extent and Limitations of the Treaty-Making Power under the Constitution*, 1 Am. J. Int'l L. 636, 661-63 (1907).

"would be an invasion of the police power of the States," *id.* at 74. "It needs no straining of logic," he explained, "but only the use of the reasoning pursued by the Supreme Court in hundreds of similar cases, to deduce the power of Congress under [the Necessary and Proper] clause to enact legislation to carry out and execute * * * an agreement by the United States to protect aliens from lawless violence." *Id.* at 81.

Similarly, two years before *Holland* and four years before his appointment to the Court, Sutherland wrote:

> The necessity of supplementary action to carry into operation treaty provisions which are not made self-executing, has the effect of authorizing Congress to legislate upon many matters which would be beyond its power in the absence of a treaty. In such case the authority is not derived from, nor is it limited by, the enumerated subjects of legislation; but it arises from [the Necessary and Proper Clause]. The power exercised in any such case is as strictly constitutional as in the case of the specifically enumerated powers, but occasion for legislative action in this field has no limits except those which bound the treaty-making power itself. The treaty-making power being one of those "vested by the Constitution in the government of the United States," the authority of Congress to pass all laws to carry it into execution is conferred by the co-efficient clause in precise and definite words.

Sutherland, *supra*, at 153-54.

By the time the *Holland* case arrived at this Court, then, the Necessary and Proper question was virtually uncontroverted.[6] That explains why the lower courts considering the Migratory Bird Act thought the question warranted at most a single sentence,[7] and why the government likewise properly treated it as a settled issue before this Court: "[T]here can scarcely be a serious contention that Congress may not enact legislation to put into effect the provisions of any treaty which the President, with the advice and consent of the Senate, may lawfully negotiate, regardless of whether the subject matter is one within or without the general legislative powers of Congress."[8]

B. *Holland*'s Holding Does Not Empower The President And The Senate To "Expand" Or "Increase" Congress's Constitutional Authority.

Notwithstanding this longstanding consensus reflected in *Holland*, the Cato *amici* repeatedly insist that *Holland* was wrong because it allegedly affords

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[6] *Amici* ignore all of this pre-*Holland* authority. They cite only one ostensible source in support of the contrary view (Cato Br. 11-12)—Henry St. George Tucker, LIMITATIONS ON THE TREATY-MAKING POWER UNDER THE CONSTITUTION OF THE UNITED STATES § 113, at 130 (1915). But even that less prominent source, written by an inveterate critic of a strong treaty power, acknowledged that if a treaty were valid, then it "might well be admitted" that the Necessary and Proper Clause would authorize Congress to enact implementing legislation otherwise outside its enumerated powers. *Id.* § 116, at 132.

[7] See, *e.g.*, *United States* v. *Samples*, 258 F. 479, 482 (W.D. Mo. 1919), aff'd *sub nom. Holland*, 252 U.S. 416; *United States* v. *Thompson*, 258 F. 257, 268 (E.D. Ark. 1919).

[8] Appellee Br. 11-13, *Holland*, 252 U.S. 416.

the President and the Senate the power to "increase" or "expand" Congress's constitutional powers merely by ratifying a treaty, thereby circumventing the Article V amendment process. See, *e.g.*, Cato Br. at i, 3, 4, 5, 10, 12, 18, 23, 26, 28, 31 ("increase"); *id.* at 4, 6, 7, 11, 14, 16, 30 ("expand").

But no one argues that a treaty can add to the constitutional powers of Congress or circumvent the constitutional amendment process. The question, instead, is whether an authority set forth in the Constitution itself—the Necessary and Proper Clause—grants Congress the power to implement valid treaties. Surely, if Article I included an express power "to implement treaties," no one would suggest that the making of a treaty "increased" Congress's constitutional powers or circumvented the amendment process. The same is true even though the Constitution confers the implementing power via the general Necessary and Proper Clause rather than singling out treaty implementation specialized mention.

Moreover, it is the very "nature of the Necessary and Proper Clause" to "empower[] Congress to enact laws in effectuation of * * * enumerated powers *that are not within its authority to enact in isolation*," *Raich*, 545 U.S. at 39 (Scalia, J., concurring in the judgment) (emphasis added). This is not only true with respect to the treaty power, but also each of Congress's enumerated powers.

After Congress declares war, for example, it may enact legislation to ensure the effectiveness of the military campaign. Nor is Congress's power to enact Necessary and Proper legislation is not "limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict,

and to remedy the evils which have arisen from its rise and progress." *Stewart* v. *Kahn*, 11 Wall. 493, 507 (1870).

For example, this Court has upheld Congress's authority to toll limitations periods for *state-law* civil and criminal cases during wartime, *ibid.*, and to impose *post-bellum* rent control, *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138 (1948).

Perhaps most strikingly, after the armistice with Germany at the close of the First World War, Congress banned the sale of distilled spirits, and then banned the manufacture and sale of all liquors containing as much as one-half of one percent alcohol, principally to "increase efficiency of production in the critical days during the period of demobilization, and help to husband the supply of grains and cereals depleted by the war effort." *Woods*, 333 U.S. at 142. The Court approved each of these measures as valid Necessary and Proper legislation, ancillary to Congress's exercise of its war powers, notwithstanding their deep intrusion into areas ordinarily reserved to the states' police powers. *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146 (1919); *Ruppert* v. *Caffey*, 251 U.S. 264 (1920).

The same dynamic occurs whenever Congress exercises one of its Article I authorities. Congress often enacts additional measures reasonably designed to ensure the effectiveness of its regulatory scheme, even though such ancillary legislation is not otherwise authorized by any of its enumerated powers. The United States Code is replete with such Necessary and Proper legislation. Well-known examples that this Court has specifically sanctioned include:

- Congress exercises its enumerated powers to tax, spend and borrow, and then incorporates a bank as an efficient means of ensuring their "beneficial execution." *McCulloch*, 4 Wheat. at 415.
- Congress passes laws regulating interstate commerce, and then also regulates "intrastate activities that are not themselves part of interstate commerce" in order "to make a regulation of interstate commerce effective." *Raich*, 545 U.S. at 34-35 (Scalia, J., concurring in the judgment).[9]
- Congress establishes "inferior" federal courts, art. I, § 8, cl. 9, and then affords such courts supplemental jurisdiction over related state claims, and then requires *state courts* to toll the limitations period on such state claims to avoid prejudicing federal claimants. *Jinks* v. *Richland County*, 538 U.S. 456 (2003).
- Congress promulgates regulatory standards and then—to promote more rigorous compliance—establishes hundreds of corresponding federal crimes, most of which could not have been enacted pursuant to an enumerated power standing alone. See *McCulloch*, 4 Wheat. at 416; *Comstock*, 130 S. Ct. at 1943, 1957-58 (citing numerous cases); see also *United States* v. *Kebodeaux*, 133 S. Ct. 2496, 2503 (2013) (civil commitment).

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[9] See also *id.* at 34-38 (citing cases); *id.* at 22 (majority opinion) (Congress could prohibit the intrastate possession and cultivation of marijuana as a necessary and proper means of enforcing its primary objective of suppressing the interstate market).

In these and many other cases, Congress's exercise of an enumerated power does not, as *amici* suggest, "increase" or "expand" Congress's constitutional authority. Instead, it serves as the basis of, and "is bound up with," *Sabri* v. *United States*, 541 U.S. 600, 608 (2004), the exercise of *another* enumerated authority—the Necessary and Proper Clause, which ensures the "beneficial execution," *McCulloch*, 4 Wheat. at 415, of the enumerated power. As Justice Scalia recently explained respecting the relationship between the Commerce and Necessary and Proper powers: "[W]here Congress has the authority to enact a regulation of interstate commerce, 'it *possesses* every power needed to make that regulation effective.'" *Raich*, 545 U.S. at 36 (Scalia, J., concurring) (emphasis added) (quoting *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 118-19 (1942)).

The same is true with respect to a valid treaty. When the President and the Senate exercise their enumerated power to make a treaty on behalf of the United States, they do not "expand" Congress's article I powers, for Congress already "possesses every power needed," *ibid.* (internal quotation marks omitted), to make that treaty effective. As Professor Corwin explained seven years before *Holland*,

> the treaty-power cannot purport to amend the Constitution by adding to the list of Congress' enumerated powers, but having acted, the consequence will often be that it has provided Congress with an opportunity to enact measures which independently of a treaty Congress could not pass at all; and the only question * * * will be whether they are 'necessary and proper' measures for the carrying of the treaty in question into operation.

Corwin, *supra* note 5, at 292.[10]

C. *Amici*'s Textual Argument Is Implausible And Ahistorical.

Eighteen pages into their argument, *amici* finally discuss the Necessary and Proper Clause itself—only to argue that it is inapposite, because it does not afford Congress any authority to enact legislation to implement valid treaties. Cato Br. at 22-25.

This counterintuitive conclusion is based on *amici*'s idiosyncratic reading of one constitutional verb. The Necessary and Proper Clause, they note, author-

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[10] *Amici* also devote a section of their brief to the supposed "paradox[]" that, under *Holland*, if the President or a treaty partner were to terminate a treaty, that would effectively "render" the implementing legislation unconstitutional. Cato Br. 14-16. But there is no paradox at all. Such a statute, consistent with obvious congressional intent, simply ceases operation when the treaty terminates—*i.e.*, when the predicate for the statute expires. It would in this respect be analogous to a law making "needful" regulations in a United States territory, see Art. IV, sec. 3, cl. 2, which ceases to operate when that territory is admitted as a State. See *Escanaba & Lake Michigan Transp. Co.* v. *City of Chicago* 107 U.S. 678, 688-89 (1883); see also *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543, 548 (1924) (a "law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed"). And if it were impossible to construe a statute to cease operation when the source of its authority runs dry, the statute would simply cease to be valid—something that would hardly be "strange" or paradoxical" (Cato Br. 15). See, *e.g.*, *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) ("the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist"); *Staub* v. *City of Baxley*, 355 U.S. 313, 330 (1958) (a law "may be valid at one time and not another").

izes Congress to carry into execution the "Powers" that the Constitution vests in the federal government or in one or more of its branches. They then observe that the Treaty Clause vests the President with the power, subject to Senate consent, "to *make*," but not in terms "to *implement*," treaties.

On *amici*'s view, once a treaty is "made," and the United States is committed to its obligations, the Necessary and Proper Clause drops out of the picture. So, for example, Congress may pass laws "necessary and proper" to fund the travel expenses of treaty negotiators, but it has no Necessary and Proper authority to adopt legislation to implement treaty commitments.

This argument is deeply flawed. To begin, even if it were the case, as *amici* insist, that the Necessary and Proper Clause only empowered Congress to adopt laws facilitating the actual "making" of treaties, laws implementing treaty stipulations would easily satisfy that test. Any nation will be reluctant to enter into treaty relations with another unless the latter provides assurance that it can enforce compliance with its side of the bargain—assurance that comes by demonstrating, and regularly exercising, a capacity to make good on its promises. If Congress were disabled from exercising such a power, the Nation's ability to make treaties with foreign partners would be significantly compromised. Indeed, that was the painful lesson the founders drew from their experience under the Articles of Confederation. See pages 9-10, *supra*.[11]

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[11] *Amici* assume the only federal "power" the legislation might "carry[] into Execution" is the Article II power to "make Treaties." It is at least arguable, however, that the Constitution im-

Convention is not valid as applied to Bond. The President lacks authority under Article II to regulate Bond's conduct and, even assuming a treaty can effectuate a congressional power, *but see supra* at 13-14, Congress lacks authority under the Commerce Clause to criminalize this behavior. Because Bond's conduct is not the proper subject of a treaty, Congress cannot rely on the Necessary and Proper Clause for its implementing authority. If the Convention is unconstitutional as applied to Bond, the statute claiming to give it domestic effect is, too.

Second, applying the Act to Bond is not "necessary" to carry the treaty's legitimate aspects into execution. Her conviction is not even tenuously incidental to the President's foreign affairs powers. It is nearly impossible to imagine a scenario in which Bond's spiteful actions might threaten global harmony or be seen as a violation of the Convention by the treaty's signatories. The links between Article II and Bond's crime are "too attenuated"—if they exist at all—to render this prosecution necessary to effectuate the treaty within its legitimate sphere of operation. *See Comstock*, 130 S. Ct. at 1963; *id.* at 1967 (Kennedy, J., concurring in the judgment) (requiring a "tangible link" to an enumerated Article I power "based on empirical demonstration").

Nor is Bond's conviction incidental to any commercial interest that the legislation might be vindicating. Whether analyzed under the Commerce Clause or the Necessary and Proper Clause the answer is the same: Congress may not "'pile inference upon inference' in order to establish that noneconomic activity has a substantial effect on ... commerce." *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514

U.S. at 567); *NFIB*, 132 S. Ct. at 2648 (joint dissent). Under the government's reasoning, a crime that involves *any* substance is ripe for federal prosecution because substances can be articles of commerce. This vision of federal power is in no way "narrow in scope," *Comstock*, 130 S. Ct. at 1964, and to embrace it "would open a new and potentially vast domain to congressional authority," *NFIB*, 132 S. Ct. at 2587 (Roberts, C.J.).

Third, and most importantly, applying the Act to Bond is not "proper." "It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause." *Comstock*, 130 S. Ct. at 1967-68 (Kennedy, J., concurring in the judgment). When exercises of federal power "violate[] the principle of state sovereignty" they cannot be "*proper* for carrying into Execution" the Government's enumerated powers. *Printz*, 521 U.S. at 924. "Rather, they are, 'in the words of The Federalist, "merely acts of usurpation" which "deserve to be treated as such."'" *NFIB*, 132 S. Ct. at 2592 (Roberts, C.J.) (quoting *Printz*, 521 U.S. at 924).

These federalism principles dictate the outcome here. In criminalizing Bond's conduct, the United States "intrude[d] upon functions and duties traditionally committed to the State." *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring in the judgment). Indeed, this Court has found "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618; *NFIB*, 132 S. Ct. at 2578 (Roberts, C.J.); *Lopez*, 514 U.S. at 561 n.3; *Lopez*, 514 U.S. at 597 n.6 (Thomas, J.,

concurring); *Cohens v. Virginia*, 6 Wheat. 264, 426, 428 (1821). As applied here, the Act operates in the heartland of state sovereignty.

It is no answer to say that the government's prosecution does not stop Pennsylvania from bringing charges in its own right. BIO 20. "[T]he scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States," as in *Printz*, for example, "but also when it violates the background principle of enumerated (and hence limited) federal power." *NFIB*, 132 S. Ct. at 2646 (joint dissent). "State sovereignty is not just an end in itself." *Bond*, 131 S. Ct. at 2364 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). Above all, our federal system exists to "secure[] the freedom of the individual," *id.*, and Bond cannot be punished under a law that unconstitutionally "change[s] ... the sensitive relation between federal and state criminal jurisdiction," *Lopez*, 514 U.S. at 561 n.3; *Bond*, 131 S. Ct. at 2367 (Ginsburg, J., concurring).

III. Only By Reversing The Judgment Below Can The Court Adhere To Precedent And Avoid Difficult Constitutional Questions Of Congressional Power.

A. The government's interpretation of the treaty power is incompatible with longstanding precedent.

The government claims that "well-settled precedent" holds that "federalism principles do not impose a limit on the subjects that can be addressed in a treaty or in

treaty-implementing legislation." BIO 23. That is untrue. Pet. Br. 26-27. For nearly two centuries, the Court has held that the treaty power is subject to "those restraints which are found in [the Constitution] against the action of the government ... and those arising from the nature of the government itself, and of that of the states." *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Reid*, 354 U.S. at 16 (nothing in the Constitution "intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution"); *Mayor of City of New Orleans v. United States*, 10 Pet. 662, 736 (1836) ("Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power."); *see also Downes v. Bidwell*, 182 U.S. 244, 370 (1901); *The Cherokee Tobacco*, 78 U.S. 616, 621-22 (1870); *Doe v. Braden*, 16 How. 635 (1835).

The Court has maintained that "[i]t would not be contended that [the power] extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states ...." *Geofroy*, 133 U.S. at 267. "[T]he framers of the Constitution intended that [the power] should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty" but only "if not inconsistent with the nature of our government and the relation between the States and the United States." *Holden v. Joy*, 84 U.S. 211, 243 (1872). Put simply, "it is well established that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Boos v. Barry*, 485 U.S. 312, 324 (1988).

Holland is not to the contrary. BIO 23-25. That case held that "[i]f the treaty is valid ... there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. That sentence is most sensibly read as rejecting what is now termed a facial challenge. Pet. Br. 29. Missouri sued to invalidate the Migratory Bird Treaty Act of 1918, which implemented a treaty between the United States and Great Britain. Pet. Br. 30 n.1. The Court interpreted Missouri's challenge as a "general one": if the treaty and statute were unlawful, it would be on the "general grounds" of interference with existing state law and the state's proprietary interest in wild fowl. *Holland*, 252 U.S. at 432, 434. In the Court's view, however, the treaty's object was of "national interest," and one that could "be protected only by national action in concert with that of another power." *Id.* at 435. In current vernacular, the treaty was facially valid because it had a "plainly legitimate sweep." *Wash. State Grange*, 552 U.S. at 449. And because (unlike in this case) Missouri did not challenge Congress's authority to implement the treaty under the Necessary and Proper Clause, the Court assumed the law's validity. *See United States v. Bond*, 681 F.3d 149, 156-57 (3d Cir. 2012) ("[T]he Court assumed without further discussion that, because the treaty was valid, so was the implementing statute.").

Moreover, the government is unwilling to embrace the full breadth of its *Holland* argument. Instead, it draws a jagged dividing line with "federalism principles" on one side and "the Constitution's express limitations on government power, such as those found in the Bill of Rights" on the other. BIO 23, 25. That is an unsustainable paradigm. In fact, the government's view seems to be of

recent vintage. Pet. Br. 36-37; *see also* 2 Op. Atty. Gen. 437 (1831) (concluding that the federal government is "under a constitutional obligation to respect [the powers reserved to the States] in the formation of treaties"); Department of State, Circular No. 175 (1955) ("Treaties are not to be used as a device for the purpose of effecting social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.").

Far from reflecting "well-settled precedent," then, the government's disquieting vision of federal power breaks faith with "the compound republic of America." The Federalist No. 51, 387 (J. Madison). The suggested distinction between provisions granting powers and those reserving rights is illusory. The government's theory would mean that treaties enacted before December 15, 1791, superseded those rights later enshrined in the first eight amendments to the Constitution, a period dating back nearly a decade to the ratification of the Articles of Confederation on March 1, 1781. *See supra* at 8 n.2. But it was not the Bill of Rights that shielded these freedoms from federal encroachment. *NFIB*, 132 S. Ct. at 2577 (Roberts, C.J.); *see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). "The enumeration of powers is also a limitation of powers, because [t]he enumeration presupposes something not enumerated." *NFIB*, 132 S. Ct. at 2577 (Roberts, C.J.). "[T]he Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights." The Federalist No. 84, 581 (A. Hamilton).

For this reason, the many powers not granted to the national government by the Constitution—and therefore reserved to the States under the Tenth Amendment—are

of equal stature to those in the Bill of Rights. Pet. Br. 34-36. The Court has made that important point clear *in this case*, *Bond*, 131 S. Ct. 2364, and in many others, *see, e.g.*, *Printz*, 521 U.S. at 935; *Morrison*, 529 U.S. at 616 n.7; *Lopez*, 514 U.S. at 567; *New York*, 505 U.S. at 177; *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring in the judgment); *NFIB*, 132 S. Ct. at 2576-78 (Roberts, C.J.); *id.* at 2676-77 (joint dissent). There is no reason to retreat because a treaty is involved. "[T]he Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment." *Id.* at 2676-77 (joint dissent).

B. Whether a treaty may intrude on powers reserved to the States cannot turn on whether it is self-executing or non-self-executing.

Although Congress's ability to implement a non-self-executing treaty is an issue warranting close attention, this case raises an important antecedent issue: "is there any initial power here at all?" *Reid*, 354 U.S. at 70 (Harlan, J., concurring in the result). By resolving the case on treaty power grounds, the Court can decide that issue and leave no doubt that Bond's conduct is beyond the authority of the United States to criminalize—period. By doing so, the Court will ensure that a decision focusing on the Act's validity is not seen as an endorsement of the mistaken idea that self-executing treaties somehow have greater substantive reach than do their non-self-executing counterparts.

There are notable procedural differences between these two instruments. Pet. Br. 31-33. Self-executing

treaties "automatically have effect as domestic law"; they are "equivalent to an act of the legislature" and each "operates of itself without the aid of any legislative provision." *Medellín*, 552 U.S. at 504-05. Non-self-executing treaties have no domestic effect until the full Congress "has ... enacted implementing statutes." *Id.* at 505. That said, the substantive scope of the treaty power cannot depend on the procedural channel used to invoke it. The Constitution's text contemplates no such distinction, and the Court, in turn, has found that the Constitution applies equally to treaties and implementing laws alike. *See Reid*, 354 U.S. at 16.

Establishing different regimes would give rise to troubling consequences. Federalism limits would apply when a treaty depends on legislation for domestic effect, as they should, but the President and Senate could evade those limits by making the treaty self-executing. Holding only treaty-implementing laws to constitutional limits would, perversely, allow the President and the Senate to accomplish objects the President, Senate, and House of Representatives together could not.

The President and Senate, for example, could abolish the death penalty, *but see Gregg v. Georgia*, 428 U.S. 153 (1976), commandeer state officials, *but see Printz*, 521 U.S. 898, or establish a national voting age for state and local elections, *but see Oregon v. Mitchell*, 400 U.S. 112 (1970). A Constitution that applies to laws implementing non-self-executing treaties but which leaves self-executing treaties unchecked would be little more than a "parchment barrier[]." The Federalist No. 48, 333 (J. Madison). The Court should deny this argument life by unequivocally holding that Bond's local conduct is beyond the substantive

reach of the treaty power no matter the Convention's path to implementation.

C. Overturning Bond's conviction as beyond the treaty power avoids hard constitutional questions.

To summarize, the Court should resolve this appeal by assuming (but not deciding) that the Convention and Act can cover any substantive power the Constitution vests in the President or Congress and holding that neither one—as applied to Bond—falls within the ambit of those powers. In so holding, the Court could establish that there is at least *some* substantive limitation on the treaty power, dispose of the government's claim that "Congress had independent authority under its commerce and necessary-and-proper clause powers to enact the Act," BIO 13, and avoid having to decide the issue taken for granted in *Holland*. By holding that criminalizing Bond's conduct is beyond the powers vested in the United States, the premise—*i.e.*, that Congress has plenary power under the Necessary and Proper Clause to carry a *valid* treaty into execution—will have been negated.

Conversely, the Court would need to decide a series of thorny constitutional issues to uphold Bond's conviction. First, the Court would need to decide whether a treaty can be predicated on an Article I power, an Article II power, or both, and which one of these powers allows the Convention to turn Bond's local crime into a federal offense. Second, the Court would need to decide if Congress has authority to implement this non-self-executing treaty. That question would require the Court in turn to decide whether Congress can anchor the Act in the Commerce

Clause or if the Necessary and Proper Clause provides it with authority to implement the treaty. These are all difficult constitutional questions that the Court should avoid deciding if possible. *See supra* at 11-14.

The Court can—and should—avoid those issues by overturning Bond's conviction as *ultra vires*. That result is faithful to precedent, avoids creating a schism between self-executing and non-self-executing treaties, and leaves for another day difficult questions of congressional power that need not be resolved here.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

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May 15, 2013

AMICUS CURIAE BRIEF

No. 12-158

IN THE

Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR *AMICI CURIAE* PROFESSORS OF INTERNATIONAL LAW AND LEGAL HISTORY IN SUPPORT OF RESPONDENT

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Baker v. City of Portland,
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Soc'y for the Propagation of the Gospel v. New Haven,
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United States v. McCullagh,
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United States v. Rockefeller,
260 F. 346 (D. Mont. 1919) 26

United States v. Samples,
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United States v. Selkirk,
258 F. 775 (S.D. Tex. 1919) 26

United States v. Shauver,
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United States v. Thompson,
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U.S. Const. amend. X ..... *passim*

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Migratory Bird Conservation Act of 1913 (Weeks-McLean Law), Pub. L. No. 430, 37 Stat. 828, *repealed by* Migratory Bird Treaty Act of 1918, Pub. L. No. 186, 40 Stat. 755 ..... 26, 29

Migratory Bird Treaty Act of 1918, Pub. L. No. 186, 40 Stat. 755 (codified as amended at 16 U.S.C. §§ 703-712) 26, 28

Negro Seamen Act of 1822, Act of Dec. 21, 1822, ch. 3, § 3, 1822 S.C. Acts 11, 12 16

Treaties

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Convention Between the United States, Great Britain, Russia and Japan for the Preservation and Protection of Fur Seals (The Fur Seal Treaty of 1911), July 7, 1911, 37 Stat. 1542 23

Definitive Treaty of Peace and Friendship Between the United States of America and His Britannic Majesty (Treaty of Paris), Sept. 3, 1783, 80 Stat. 80 8

Treaty of Amity, Commerce, and Navigation (Jay Treaty), U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116 11

Treaty of Commerce and Navigation, U.S.-Japan, April 5, 1911, 37 Stat. 1504 29

Treaty with Great Britain Relating to Boundary Waters and Questions Arising along the Boundary Between the United States and Canada (Boundary Waters Treaty), January 11, 1909, 36 Stat. 2448 (1910) 23

Other Authorities

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8 Op. Att'y Gen. 417 (1857) 18

22 Op. Att'y Gen. 214 (1898) 22

Ambrose, Stephen E., *Eisenhower: The President* (1984) 32

Burr, Charles H., *The Treaty-Making Power of the United States and the Methods of Its Enforcement as Affecting the Police Powers of the States* (1912) 19, 25

Butler, Charles Henry, *The Treaty-Making Power of the United States* 22

Caroliniensis No. 7, Charleston Mercury, Aug. 28, 1823 17

Corwin, Edward S., *National Supremacy: Treaty Power vs. State Power* (1913) 19, 24, 25

Devlin, Robert T., *The Treaty Power Under the Constitution of the United States* (1908) 25

Flaherty, Martin S., *History Right? Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum. L. Rev. 2095 (1999) 3

Foreign Relations of the United States, 1952-1954 (William Z. Slany et al. eds., 1983) 33

Golove, David M., *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) ..... *passim*

Hamilton, Alexander, *Remarks on the Treaty of Amity Commerce and Navigation Lately Made Between the United States and Great Britain* (July 9-11, 1795) 12

Hamilton, Alexander, *The Defence No. XXXVI* (Jan. 2, 1796) 13

Hamilton, Alexander, *The Defence No. XXXVII* (Jan. 6, 1796) 13

Hamilton, Alexander, *The Federalist No. 22* (Gary Wills ed., 1982) 3

Hearing, Treaties and Executive Agreements Before the Sen. Judiciary Comm. (1955) 34

Hollis, Duncan B., *Treaties in the Supreme Court, 1861 to 1900, in International Law in the U.S. Supreme Court: Continuity and Change* 55 (David L. Sloss et al. eds., 2011) 19

Holman, Frank E., *The Story of the "Bricker Amendment"* 38 (1954) 32

Kuhn, Arthur K., *The Treaty-Making Power and the Reserved Sovereignty of the States*, 7 Colum. L. Rev. 172 (1907) 25

Letter from President Eisenhower to William F. Knowland, Majority Leader (Jan. 25 1954), *in Foreign Policy*, Congressional Quarterly Almanac 10 (1954) 33

Lockwood, Jr., Bert B., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 Iowa L. Rev. 901 (1984) 31

Madison, James, *Vices of the Political System of the United States, April 1787* 3

Madison, James, *The Federalist No. 42* (Gary Wills ed., 1982) 4

Pendleton Mitchell, Nicholas, *State Interests in American Treaties* (1936) 19

Philonimus No. 7, Charleston Mercury, Sept. 13, 1823 17

Ramsey, Michael D., Missouri v. Holland *and Historical Textualism*, 70 Mo. L. Rev. 969 (2008) 7

Root, Elihu, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 Am. J. Int'l L. 273 (1907) 24

St. George Tucker, Henry, *Limitations on the Treaty-Making Power Under the Constitution of the United States* (1915) 25

Sloss, David, *International Agreements and the Political Safeguards of Federalism*, 55 Stan. L. Rev. 1963 (2003) 5

Tananbaum, Duane, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* (1988) 31, 33

The American Remembrancer; or an Impartial Collection of Essays, Resolves, Speeches &c., Relative or Having an Affinity to the Treaty with Great Britain 63 (Mathew Carey ed., 1795) 11, 12

The Argument of Benjamin Faneuil Hunt, in the Case of the Arrest of the Person Claiming to be a British Seaman, under the 3d Section of the State At of Dec. 1822, in Relation to Negroes, &c., before the Hon. Judge Johnson, Circuit Judge of the United States, for 6th Circuit (1823) *reprinted in* 2 *Free Blacks, Slaves, and Slaveowners in Civil and Criminal Courts* (Paul Finkelman ed., 1988) 16, 17

The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787 (Jonathan Elliot ed., 2d ed. 1996) (1836) 4, 5, 6

The Papers of Alexander Hamilton (Harold C. Syrett ed., 1973) 12

The Records of the Federal Convention of 1787 (Max Farrand ed., 1911) 3

Van Alstine, Michael P., *Treaties in the Supreme Court, 1901 to 1945, in International Law in the U.S. Supreme Court in the U.S. Supreme Court: Continuity and Change* 55 (David L. Sloss et al. eds., 2011) 23, 24

INTEREST OF THE AMICI CURIAE

Amici curiae are professors of international law and legal history interested in sharing their knowledge of the treaty power in American constitutional history with this Court.[1]

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed letters of consent for amicus briefs with the Court.

SUMMARY OF ARGUMENT

The United States was able to become a global superpower because of the Framers' wise decision to allow the federal government to exercise national control in foreign affairs. Throughout our history, this power has been judiciously managed by our elected officials. As this brief shows, the Framers recognized and intended that treaties could operate in areas that would otherwise be left to the states, and treaties have impacted domains of state authority in various ways throughout U.S. history. Although Carol Bond's case could be decided on relatively narrow grounds, Petitioner and her *amici* invite this Court to overrule more than two centuries' worth of precedent and dramatically curtail the U.S. government's ability to credibly commit to and enforce international treaties. Instead, this Court should adhere to longstanding precedent and avoid crafting any new constitutional rules that might have unforeseen and harmful effects on foreign affairs and America's standing in the world.

ARGUMENT

I. The Framers Gave The Treaty Power To The Federal Government To Protect The Nation's Unity, Sovereignty, And Security In Foreign Affairs.

Under the Articles of Confederation, the federal government's inability to compel state compliance with treaty obligations vexed the young nation's ability to conduct foreign affairs and helped spur the calling of the Constitutional Convention in 1787. At that time, James Madison noted with concern that "not a year has passed without instances" of treaty

violations by "some one or other of the States." James Madison, *Vices of the Political System of the United States, April 1787, available at* http://founders.archives.gov/documents/Madison/01-09-02-0187; *see also* 1 *The Records of the Federal Convention of 1787*, at 164 (Max Farrand ed., 1911) (statement of James Madison) ("Experience had evinced a constant tendency in the States . . . to violate national Treaties."). As Alexander Hamilton explained, with "treaties of the United States . . . liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction," the "faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests" of each state, leaving the nation on so "precarious a foundation" that other nations could not trust or respect it. *The Federalist No. 22*, at 131 (Alexander Hamilton) (Gary Wills ed., 1982). *See generally* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1100-48 (2000) (describing founding era discussion of treaty power) [hereinafter Golove, *Treaty-Making*]; Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum. L. Rev. 2095, 2125 (1999).

The text of the new Constitution thus unambiguously delegated the full sovereign power to make treaties to the national government in Article II, U.S. Const. art II, § 2, cl. 2, while expressly denying states any power to make or to negate treaties. U.S. Const. art I, § 10, cl. 1 ("No state shall

enter into any Treaty, Alliance, or Confederation . . . ."); U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also The Federalist No. 42*, at 253 (James Madison) (Gary Wills ed., 1982) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."). When the Framers split the atom of sovereignty, they awarded the full sovereign power to make treaties to the federal government and not the states, rendering the Tenth Amendment inapplicable by its own terms. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

That is not to say the treaty power is entirely unlimited. As this Court has long held, the Bill of Rights constrains the treaty power. *See Reid v. Covert*, 354 U.S. 1, 16-19 (1957). Similarly, a treaty could not be used to violate other prohibitory language in the Constitution, for example by purporting to appropriate funds from the federal treasury in contravention of the normal Article I requirements. *See* U.S. Const. art. I, § 9 ("No money shall be drawn from the treasury, but in consequence of appropriations made by law.").

Nor is the basic architecture of our federal system abandoned in the treaty context. First and foremost, the Framers chose to protect federalism by requiring the consent of two-thirds of the Senate. *See* 2 *The Debates in the Several State Conventions on the*

Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, at 507 (Jonathan Elliot ed., 2d ed. 1996) (1836) [hereinafter *Elliot's Debates*] (statements of James Wilson at Pennsylvania ratifying convention) ("[I]n the making of treaties, the states are mediately represented, and the people immediately represented; two of the constituent parts of government must concur in making them. Neither the president nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced, as to produce security to the people."). This was a considered choice, made in the context of concerns over potential treaties that threatened state interests of the most sensitive nature, but also in the face of consensus that subject matter limits on the treaty power were unwise. *See* Golove, *Treaty-Making*, *supra*, at 1133-49. Whatever skepticism might be warranted about the political safeguards of federalism in the statutory context, the Framers self-consciously chose to rely on an extraordinary supermajority requirement in the treaty context. This steep hurdle has significantly constrained the federal government from entering into treaties that would negatively affect the balance of our federal system. *See* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan. L. Rev. 1963, 1984-88 (2003).

Other constraints serve to protect federalism as well. Although Guarantee Clause claims have been found non-justiciable in other contexts, a treaty that denied states a republican form of government would likely be invalid under that clause. U.S. Const. art. IV, § 4. And while this Court has never directly

addressed the issue, it is possible that the anti-commandeering principle might come into play in an appropriate case. *See New York v. United States*, 505 U.S. 144 (1992).

It is equally clear, however, that the Framers did not curtail the treaty power in the particular ways that Petitioner and some of her *amici* suggest, namely by limiting the domestic effect of treaties to topics within Congress's other Article I powers or by carving off some vague substantive areas of regulation for exclusive state control. To the contrary, the Framers of the Constitution abandoned the confusing substantive caveats to the federal treaty power that existed under the Articles of Confederation, substituting a plenary delegation of authority to the President "to make Treaties" with the concurrence of the Senate. U.S. Const. art II, § 2, cl. 2. This textual conveyance of plenary national authority (accompanied by the explicit prohibition of such power to the states) is unambiguous and was not an accidental or unconsidered choice. *See* 3 *Elliot's Debates*, *supra*, at 363 (statement of Gov. Randolph at Virginia ratifying convention) ("The various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition. The government ought to have power to provide for every contingency."); *see also id.* at 509 (statement of George Mason at same) (noting with some concern that "[t]he President and Senate can make any treaty whatsoever" and proposing substantive limitations on the scope of the treaty power, which were not incorporated); Golove, *Treaty-Making*, *supra*, at 1089-1100, 1131 (noting that founding materials reveal the "shared supposition

that the [treaty] power was general and would extend as far as was customary under international practice"); Michael D. Ramsey, Missouri v. Holland *and Historical Textualism*, 70 Mo. L. Rev. 969, 1006 (2008) (concluding that Constitution's original meaning did not include subject matter limitations on treaty power).

II. From The Early Republic, Treaties Have Regulated Matters That Would Otherwise Be Within The Exclusive Legislative Power Of The States.

Extensive historical practice belies the argument that treaties cannot be implemented domestically unless they fall within one of Congress's other enumerated powers, or that there is some "invisible radiation" from the Tenth Amendment that categorically precludes federal enforcement of treaties addressing subjects within traditional state police powers. Petitioner and her *amici* suggest that modern treaties (especially international human rights treaties) intrude into state regulatory domains in a way that treaties in the past did not. But from the earliest days of the Nation, this Court and the lower courts have consistently enforced treaties in sensitive areas that otherwise would have fallen within the reserved powers of the states. This was so even during time periods when the federal government was otherwise understood to have very limited legislative authority over domains of traditional state police power. Indeed, objections to federal treaty authority grounded in states' rights quite similar to those in the present case arose at various points in the nation's history, but they were

soundly and repeatedly rejected in favor of a broad and flexible national power.

A. Treaties In The Founding Period And Beyond Routinely Preempted State Contract And Property Law.

1. The Treaty Of Peace Between The United States And Great Britain In 1783 Validly Preempted State Debt Confiscation Statutes That Otherwise Fell Within The Exclusive Legislative Competence Of The States.

One of the first serious foreign policy questions the United States encountered was the treatment of debts owed by Americans to British creditors. The 1783 peace treaty between the United States and Britain overruled state laws concerning property and contract by requiring the repayment of debts to British creditors notwithstanding state confiscation laws. Definitive Treaty of Peace, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 80 Stat. 80. In response, opponents of the treaty insisted that it unconstitutionally interfered with the states' internal police powers. *See* Golove, *Treaty-Making*, *supra*, at 1124-25. These arguments encouraged state noncompliance with the treaty, which, in turn, dramatically undermined the diplomatic position of the new nation and, as noted, helped provoke the adoption of a new Constitution that would remedy this defect.

When cases pursuant to the peace treaty came before the courts under the new Constitution, the treaty was consistently enforced over contrary state laws. In the seminal case *Ware v. Hylton*, 3 U.S. (3

Dall.) 199 (1796), for example, a British creditor sued American debtors to recover a debt incurred before the war. *Id.* at 199-201. The defendants argued that their debts had been discharged by a 1777 Virginia statute, but this Court held that the treaty preempted the otherwise valid state law. *Id.* at 237 (opinion of Chase, J.)

Significantly, the Court indicated that the state confiscation statute governed matters that would have been within the exclusive legislative competence of Virginia at the time it was enacted. For example, Justice Chase (in the first of the *seriatim* opinions expressing the Court's judgment) acknowledged that Virginia had authority to pass the confiscation statute in the first place, stating that "I am of opinion that the exclusive right of confiscating during the war, all and every species of British property, within the territorial limits of Virginia, resided only in the Legislature of that commonwealth." *Id.* at 222; *see also id.* at 266 (Iredell, J., dissenting on other grounds) (agreeing that prior to the treaty, the continental "Congress could have passed no act on this subject, but if it had wished for an act, must have recommended to the State Legislatures to pass it"). But the Court rejected the argument that the federal Congress lacked the "power to make a treaty, that could operate to annul a legislative act of any of the states, and to destroy rights acquired by, or vested in individuals, in virtue of such acts." *Id.* at 235 (opinion of Chase, J.). Whatever doubts might have existed under the Articles of Confederation, the new Constitution made clear that "[i]t is the declared will of the people of the United States that every treaty made, by the authority of the United States,

shall be superior to the Constitution and laws of any individual State; and their will alone is to decide." *Id.* at 237.

The opinions rejected as contrary to the constitutional scheme the contention that state legislatures alone could remedy any inconsistency between the treaty and state law, for "[i]f a law of a State, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may controul or defeat the will of the whole." *Id.*; *id.* at 281 (opinion of Wilson, J.) ("The treaty is sufficient to remove every impediment founded on the law of Virginia."); *id.* at 284 (opinion of Cushing, J.) (similar).

Even before *Ware*, lower courts under the authority of the Supremacy Clause had been enforcing the peace treaty obligations. *See, e.g.*, *Hamilton v. Eaton*, 11 F. Cas. 336, 338, 340 (C.C.D. N.C. 1792) (enforcing treaty obligation to repay debts despite North Carolina state law). Later cases continued to enforce the treaty over inconsistent state laws. *See, e.g.*, *Higginson v. Mein*, 8 U.S. (4 Cranch) 415, 419 (1808) ("If, then, [Georgia's] act of confiscation, independent of the treaty, would be construed to destroy the claim of the mortgagee, the treaty reinstates the lien in its full force . . . ."); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 458 (1806) (denying enforcement of Virginia statute of limitations because it was inconsistent with treaty).

2. Treaties Governing Land Ownership Were Adopted And Enforced Over States' Rights Objections From The Founding Era Forward.

Another major area of controversy in the early Republic (and in later years) concerned ownership of real property, something ordinarily at the core of states' police powers. *See* Golove, *supra*, at 1106-15. In 1794, simmering tensions between Great Britain and the United States led President Washington, in the hopes of avoiding a war, to dispatch Chief Justice Jay to negotiate a new treaty. The terms of the resulting treaty provoked extensive controversy.

One focus of initial debate was a provision providing British subjects with the right to sell, devise, and inherit real property. *See* Treaty of Amity, Commerce, and Navigation (Jay Treaty), U.S.-Gr. Brit., art. 9, Nov. 19, 1794, 8 Stat. 116. Opponents of the Jay Treaty argued that this provision would result in massive redistribution of land to British owners, would interfere with states' rights to govern real property within their territories, and would therefore exceed the treaty power. *See* Golove, *Treaty-Making*, *supra*, at 1157-78; *id.* at 1158 (quoting Virginia Senator Henry Tazewell's argument against ratification on the grounds that "the rights of the individual States are by the 9th article of the treaty, unconstitutionally invaded"); Cato [Robert Livingston], *Observations on Mr. Jay's Treaty, No. XVI, reprinted in* 3 *The American Remembrancer; or an Impartial Collection of Essays, Resolves, Speeches &c., Relative or Having an Affinity to the Treaty with Great Britain* 63 (Mathew Carey ed., 1795) (arguing that Article 9 "appears to

infringe the constitutional independence of the respective states" because "[t]his is an act of sovereignty which is confined to the state legislatures, and which they have not ceded to congress, about which, therefore, I am led to doubt the right of the president and senate to treat"); Decius [Brockholst Livingston], *Reflections on Mr. Jay's Treaty, No. II, reprinted in* 2 *The American Remembrancer* 125 (arguing that Article 9 "infringes the rights of the different States").

These states' rights objections were decisively rejected in both the political and judicial realms. In response to George Washington's request for analysis of the Jay Treaty, Alexander Hamilton refuted the states' rights objections, noting that restricting treaties on the grounds that they invaded the legislative domain of the states "would totally subvert the power of making Treaties" for "[t]here can hardly be made a Treaty which does not make some alteration in the existing laws and which does not, as to its objects, controul the legislative authority – and from the nature of our constitution this must apply to the State laws and legislatures as well as to those of the Union." Golove, *Treaty-Making*, *supra*, at 1160 (quoting Alexander Hamilton, *Remarks on the Treaty of Amity Commerce and Navigation Lately Made Between the United States and Great Britain* (July 9-11, 1795), *in* 18 *The Papers of Alexander Hamilton* 428 (Harold C. Syrett ed., 1973)) [hereinafter *Hamilton Papers*]. Later, in published essays defending the Jay Treaty, Hamilton asserted that "[i]t was impossible for words more comprehensive to be used than those which grant the power to make treaties . . . . [W]hatever is a proper subject of

compact between Nation & Nation may be embraced by a Treaty." Alexander Hamilton, *The Defence No. XXXVI* (Jan. 2, 1796), *reprinted in* 20 *Hamilton Papers*, at 6. The language of the Supremacy Clause, Hamilton explained, laid to rest any "room for question whether a Treaty of the Union could embrace objects the internal regulation of which belonged to the separate authorities of the States." Hamilton, *The Defence No. XXXVII* (Jan. 6, 1796), *reprinted in* 20 *Hamilton Papers*, at 16.

These views carried the day, reflecting the considered view of the Founding generation on the scope of the Treaty Clause. The Senate provided its consent to the Jay Treaty; Washington ratified it; when the House adopted implementing legislation, the floor debates contained no mention of any lingering constitutional objections to Article 9 on states' rights grounds (though opponents voiced other strenuous policy objections). *See* Golove, *Treaty-Making*, *supra*, at 1176.

Thereafter, this Court – which was fully aware of the preceding debates and some members of which had previously opposed the Jay Treaty – consistently upheld the controversial provisions permitting alien land ownership. The issue most prominently came to this Court in *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812), which concerned Lord Fairfax's vast properties in Virginia. *Id.* at 604. While Lord Fairfax had taken Virginia citizenship and retained it after the Revolution, when he died in 1781 his heir, Denny Fairfax, was a British subject. *Id.* at 607. This led to years of controversy, state legislation purporting to reallocate the lands, the sale of some of the property to (oddly enough) Chief

Justice John Marshall, and protracted litigation. The parties' arguments implicated both Article 9 of the Jay Treaty and Article VI of the earlier 1783 peace treaty, which had provided that "there shall be no future Confiscations made" of British subjects' property.

In the Virginia Court of Appeals, Judge Spencer Roane advanced the states' rights position, holding that Article VI of the Treaty of Peace should be read narrowly so as not to affect the ordinary common law rules against devising property to aliens. To read it otherwise, he reasoned, would "invade a right of the several states, entirely of an internal and municipal nature" and that was "emphatically, beyond the power of congress" at least under the Articles of Confederation. *Hunter v. Fairfax's Devisee*, 15 Va. 218 (1810), app. at 620. At most, Judge Roane asserted, these types of treaty provisions constituted a recommendation that state legislatures change their laws. *Id.* Roane thought the Jay Treaty inapplicable because it had not yet been ratified when the case began, and he suggested that its terms had no bearing on the proper interpretation of the 1783 treaty because the federal government had broader powers under the new Constitution. *Id.* at 611, 625. In other words, even a judge working hard to assert a states' rights position in the case recognized the breadth of the federal government's powers under the Constitution. *See also* Golove, *Treaty-Making*, *supra*, at 1199.

This Court reversed in an opinion by Justice Story. *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 628. The Court held that Article 9 of the Jay Treaty "completely protects and confirms the title of Denny

Fairfax." *Id.* at 627. On remand, the Virginia Court of Appeals defiantly refused to enforce the judgment and held that this Court had lacked appellate jurisdiction over its decisions. This Court reversed yet again in its landmark decision of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 323, 362 (1816).

Subsequent decisions of this Court continued to enforce treaty provisions governing alien land ownership, negating any possible states' rights limitation on the treaty power based on categories that would ordinarily fall within the states' police powers and outside federal legislative power. *See, e.g.*, *Soc'y for the Propagation of the Gospel v. New Haven*, 21 U.S. (8 Wheat.) 464, 490-92 (1823) (applying treaty to protect property of a British corporation from escheat for alienage under state law); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453, 462-65 (1819) (applying Article VI of the Treaty of Peace and Article 9 of Jay Treaty instead of state law on escheat of estates); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594, 599-600 (1818) (reaffirming supremacy of Article 9 of Jay Treaty); *Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 270, 277-78 (1817) (finding it "unnecessary to inquire into the consequences" of a Maryland alien land ownership law because a treaty with France enabled the subjects of France to hold lands in the United States).

B. States' Rights Limitations On The Scope Of The Treaty Power Were Asserted In Connection With Defending Slavery, But Were Decisively Rejected By The Nation.

The argument that states' rights limited the substantive scope of the treaty power was revived in connection with the defense of slavery in the antebellum period, but was ultimately rejected as decisively as it had been in the early Republic. One flashpoint concerned the presence of free persons of African descent in the Southern states. In 1822, South Carolina passed the Negro Seamen Act, which provided for the jailing of black sailors when their ships docked in South Carolina ports and their sale as slaves if the captain of the ship failed to ransom them out by paying the expenses of their detention. *See* Golove, *Treaty-Making*, *supra*, at 1211-38. When this provision was applied to black sailors on British ships, the British government objected that this violated the terms of the Commercial Convention of 1815.

In a habeas case involving a detained black British sailor, the defenders of the South Carolina law asserted that the state had retained the sovereign right to protect its vital interests and that "the treaty making power can make no stipulation which shall impair the rights, which by the constitution are reserved 'to the States respectively, or to the people.'" Benjamin Faneuil Hunt, *The Argument of Benjamin Faneuil Hunt, in the Case of the Arrest of the Person Claiming to be a British Seaman, under the 3d Section of the State Act of Dec. 1822, in Relation to Negroes, &c., before the Hon. Judge Johnson, Circuit Judge of the United States,*

for 6th Circuit 1, 4 (1823), *reprinted in* 2 *Free Blacks, Slaves, and Slaveowners in Civil and Criminal Courts* at 1-22 (Paul Finkelman ed., 1988). Riding circuit, Supreme Court Justice William Johnson – a native South Carolinian and noted Jeffersonian – rejected this argument. Such a crabbed interpretation of the treaty power would render the Union, "like the old confederation . . . a mere rope of sand." *Elkison v. Deliesseline*, 8 F. Cas. 493, 496 (C.C.D. S.C. 1823). Outraged defenders of South Carolina's laws launched a campaign of criticism against the decision. In a series of essays, they argued that treaties could not interfere "with the numerous undefined powers reserved to the states" and that a treaty "is no more than an act of congress" and cannot "interfere . . . with the powers . . . reserved to the states respectively." *Caroliniensis No. 7*, *Charleston Mercury*, Aug. 28, 1823. Justice Johnson responded in his own series of essays defending the supremacy of the federal treaty power. Among other things, he noted, if the treaty power were limited in the way South Carolina suggested "we have been strangely inattentive to our rights for half a century past. For upon a cursory examination of treaties, I find no less than thirty-six instances in which the rights of the States have been invaded" and in which "treaties have acted upon subjects within the acknowledged reservation of the states." *Philonimus No. 7*, *Charleston Mercury*, Sept. 13, 1823.

Although the issue never directly reached the Supreme Court, it festered as a thorn in American-British relations because Southern states insisted that they would resist federal encroachment on what

they perceived as the most crucial domain of state police powers. In the continuing debate, future Chief Justice Roger Taney, then Attorney-General, would offer his own opinion in favor of the states' rights view on the relationship between the treaty power and the Negro Seaman Acts, but even he acknowledged that the Supreme Court was not likely to agree. *See* Golove, *Treaty-Making*, *supra*, at 1226-29.[2] Taney's arguments were intimately related to a broader conception of states' rights and "strict construction" that sought to carve out of the federal government's otherwise delegated powers an exclusive domain of state authority over issues such as slavery. Ultimately, the Nation repudiated this antebellum edifice of states' rights in the crucible of the Civil War. *See id.*

C. Throughout The Nineteenth Century, Treaties Regulated A Wide Variety Of Subjects Within The Police Powers Of The States.

While a few topics, like the Negro Seaman Acts, sparked controversy, throughout the nineteenth century, the federal government continued with little fanfare to enter into numerous treaties that touched on areas that would otherwise fall within states' traditional police powers. *See, e.g.*, Nicholas

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[2] When he was Attorney General, Caleb Cushing issued an elaborate opinion defending national treaty power against antebellum states' rights objections. *See* 8 Op. Att'y Gen. 417 (1857) (cited in *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880) and *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)).

Pendleton Mitchell, *State Interests in American Treaties* 157-204 (1936) (listing treaties governing various topics affecting state powers). Dozens of treaties provided, *inter alia*, that aliens and their property should be protected under local law, *id.* at 159-60; for the right of aliens to dispose of their property, *id.* at 163-66; that aliens should have access to court, *id.* at 160-61; for the religious freedom of aliens, *id.* at 162; for consular powers, privileges and immunities, *id.* at 173-82; and extradition, *id.* at 185-202. *See also* Edward S. Corwin, *National Supremacy: Treaty Power vs. State Power* 134-36 (1913) (describing broad array of treaties in nineteenth century).

During this period, this Court applied treaties frequently and did not, in any instance, refuse to enforce a treaty on federalism grounds. *See* Duncan B. Hollis, *Treaties in the Supreme Court, 1861 to 1900, in International Law in the U.S. Supreme Court: Continuity and Change* 55, 55 (David L. Sloss et al. eds., 2011) [hereinafter *International Law in the U.S. Supreme Court*]; Charles H. Burr, *The Treaty-Making Power of the United States and the Methods of Its Enforcement as Affecting the Police Powers of the States*, 51 Proc. Am. Phil. Soc'y 270, 356 (1912) (discussing cases up to approximately 1909, and asserting "[s]uch is the unbroken series of cases decided by the Supreme Court of the United States, recognizing, stating, and enforcing the absolute supremacy of treaty provisions over State laws. No case has ever in the history of the United States been decided, which holds, for any reason or under any conditions a treaty provision to be subordinate to a State law or State right"). Indeed,

when the Court declared the 1870 Trademark Act beyond Congress's Article I commerce and intellectual property protection powers, it noted that it was "leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect." *In re Trade-mark Cases*, 100 U.S. 82, 99 (1879).

In *Geofroy v. Riggs*, 133 U.S. 258 (1890), this Court upheld yet another treaty provision that, notwithstanding state laws, granted aliens the right to inherit real property. *Id.* at 267. The Court explained "[t]hat the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear." *Id.* at 266. Indeed, citing *Ware v. Hylton* and other cases from the early Republic, the Court went on to say,

> [t]he treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. . . . But, with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any

> matter which is properly the subject of negotiation with a foreign country.

Id. at 267; *see also, e.g.*, *Burthe v. Denis*, 133 U.S. 514, 520-21 (1890) (finding that Louisiana state distribution laws must give way to a treaty requiring payment of an award to a French national); *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879) (enforcing treaty governing property of alien who died intestate and noting that it "is a fundamental principle in our system of complex national polity" that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution"); *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 756, 758, 760 (1866) (finding that state law purporting to tax lands held by three tribes could not be enforced since it was in conflict with treaties); *In re Ah Chong*, 2 F. 733, 737-38 (C.C.D. Cal. 1880) (striking down a state law that prohibited aliens from fishing in state waters, in part, because the law violated a treaty); *In re Tiburcio Parrott*, 1 F. 481, 494, 499 (C.C.D. Cal. 1880) (Hoffman, J.) (invalidating state law prohibiting employment of Chinese residents by California corporations and holding that "even if the reserved power of the state over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid, because in conflict with the treaty"); *Baker v. City of Portland*, 2 F. Cas. 472, 473-74 (C.C.D. Or. 1879) (striking down an Oregon law prohibiting the employment of Chinese persons on public works projects as contrary to a treaty); *In re Ah Fong*, 1 F. Cas. 213, 216-18 (C.C.D. Cal. 1874) (invalidating on treaty and other

grounds a California law excluding "lewd" Chinese women).

Moreover, state courts operating under the obligations of the Supremacy Clause also enforced treaty obligations over inconsistent state laws. For example, the Louisiana Supreme Court held that a Louisiana tax on foreign heirs could not be applied where contrary to the terms of the 1853 France-U.S. consular convention. *See Succession of Louis Dufour*, 10 La. Ann. 391, 392-93 (1855) ("[The] said provision [of the treaty] being constitutionally valid must be [obeyed] as supreme law; [and] consequently the statute of Louisiana has become *pro tanto* inoperative."); *see also People v. Gerke*, 5 Cal. 381, 385 (1855) (enforcing treaty governing alien land ownership); *Forbes v. Scannell*, 13 Cal. 242, 283 (1859) (reaffirming *Gerke*).

The Executive Branch generally endorsed the same view. In 1898, for example, Attorney General John Griggs concluded that the federal government had the power to make a treaty regarding fisheries along the Canadian border notwithstanding the fact that "regulation of fisheries in navigable waters within the territorial limits of the several States, in the absence of a Federal treaty, is a subject of State rather than of Federal jurisdiction." 22 Op. Att'y Gen. 214 (1898); *cf. McCready v. Virginia*, 94 U.S. 391, 395 (1876) (finding fisheries "under the exclusive control of the State," in a case not involving a treaty). *See also* Golove, *Treaty-Making*, *supra*, at 1241-42 (discussing executive views); Charles Henry Butler, *The Treaty-Making Power of the United States* i-ii (2 vols. 1902) (endorsing broad federal treaty power).

D. In The Twentieth Century, This Court Reconfirmed The Broad Scope Of The Treaty Power And The Supremacy Of Treaties Over State Law.

1. In The First Decades Of The Twentieth Century, This Court Continued To Apply A Broad Conception Of The Treaty Power.

This Court's early twentieth century jurisprudence was notable for its stringent limitations of federal power, but the Court continued to uphold treaties even as the range of topics they covered expanded to include more areas that would otherwise fall within the states' control. Treaties in this time period frequently addressed not only international issues affecting individuals such as immigration, citizenship, and extradition, but also more typically domestic subjects including wildlife preservation,[3] water quality,[4] and drug control.[5] *See* Michael P. Van Alstine, *Treaties in the Supreme*

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[3] *See, e.g.*, Convention between the United States and Other Powers Providing for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 1542, (providing for protection of wildlife).

[4] Boundary Waters Treaty, Jan. 11, 1909, 36 Stat. 2448, (establishing an international commission to oversee issues related to waters on the boundary between the United States and Canada including water pollution).

[5] International Opium Convention, Jan. 23, 1912, 38 Stat. 1912 (requiring nations to control opium).

Court, 1901 to 1945, in International Law in the U.S. Supreme Court, supra, at 191, 192.

The Court applied treaties in more than two hundred cases in the first part of the century. *See id.* at 193. For example, in *Neely v. Henkel*, 180 U.S. 109 (1901), the Court upheld an order of extradition to Cuba, and using language presaging the more famous opinion in *Missouri v. Holland*, noted that as long as a treaty is valid, Congress has the power to "make all laws necessary and proper for carrying into execution . . . such legislation as is appropriate to give efficacy" to the treaty. *Id.* at 121.

Shortly after the turn of the century, controversy arose when San Francisco tried to segregate Asian children into separate schools, prompting an objection from Japan based on the 1894 Treaty of Commerce and Navigation. *See* Golove, *Treaty-Making, supra*, at 1249-50. Facing federal pressure, the city backed down and rescinded the policy before the matter could be resolved in the courts. However, in response to this controversy, influential commentators reaffirmed the broad scope of the treaty power, responding to a minority of voices seeking to revive the states' rights arguments that had been rejected in earlier periods. *See, e.g.*, Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution,* 1 Am. J. Int'l L. 273, 278 (1907) ("It has been widely asserted or assumed that this treaty provision and its enforcement involved some question of state's rights. There was and is no question of state's rights involved, unless it be the question which was settled by adoption of the constitution."); Edward S. Corwin, *National Supremacy, supra*, at 296-308 (supporting

broad federal treaty power); Robert T. Devlin, *The Treaty Power Under the Constitution of the United States* 128-32 (1908) (same); Charles H. Burr, *The Treaty-Making Power of the United States*, *supra*, at 397-98 (1912) (same); Arthur K. Kuhn, *The Treaty-Making Power and the Reserved Sovereignty of the States*, 7 Colum. L. Rev. 172, 185 (1907) (same). *But see, e.g.*, Henry St. George Tucker, *Limitations on the Treaty-Making Power Under the Constitution of the United States* 392-95 (1915) (arguing that power to exclude children from public schools on basis of race falls within states' reserved powers and that federal government lacked power to compel admission of children to public schools on basis of treaty).

2. *Missouri v. Holland* Was Supported By Precedent When It Was Decided And Has Been Consistently Followed In The Ensuing Nine Decades.

This Court's 7-2 decision in *Missouri v. Holland*, 252 U.S. 416 (1920), thus was not a novel or ill-considered decision but was entirely consistent with long-standing interpretation of the treaty power, affirmed in the face of repeated challenges. While displaying Justice Holmes' characteristic conciseness, the opinion drew upon the long line of precedents already discussed as well as the writings of leading commentators, especially Edward Corwin's then-recent historical treatise on the issue. *See* Golove, *Treaty-Making*, *supra*, at 1257-58.

The treaty at issue in *Missouri* addressed the impending extinction of migratory birds in North America due to overhunting and, in doing so, entered into an area that had been held to fall within the

states' police powers. *See Geer v. Connecticut*, 161 U.S. 519, 523, 529, 534-35 (1896) (finding control of wild game to fall within state police power). Congress had tried to protect migratory birds by statute in 1913, but the lower courts had found that legislation unconstitutional. *See United States v. McCullagh*, 221 F. 288, 294-96 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154, 159-60 (E.D. Ark. 1914).

At the same time, however, concern about the issue led to calls for the negotiation of a treaty on the topic, which President Wilson quickly pursued. The resulting treaty on migratory birds with Great Britain (on behalf of Canada) was ratified in 1916 and was followed by passage of the Migratory Bird Treaty Act of 1918, which this Court considered and upheld in *Missouri*. Even before it reached this Court, the outcome of this litigation seemed assured; all four lower courts considering challenges to the 1918 legislation upheld its validity. *See United States v. Rockefeller*, 260 F. 346, 348 (D. Mont. 1919); *United States v. Selkirk*, 258 F. 775, 776 (S.D. Tex. 1919); *United States v. Samples*, 258 F. 479, 484-85 (W.D. Mo. 1919), *aff'd sub nom. Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. Thompson*, 258 F. 257, 268 (E.D. Ark. 1919).

Like Petitioner in this case, the State of Missouri argued strenuously that the statute intruded upon traditional state police powers. Brief for Petitioner, *Missouri v. Holland*, 252 U.S. 416 (1920). Missouri's argument was that under the Tenth Amendment "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." *Missouri*, 252 U.S. at 432. But, as

the Court pointed out, this claim ignored the fact that the treaty power is an independent grant of power to the federal government. *See id.* ("To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly."). As a result, the question reduced to "whether [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Id.* at 434. In finding that there was no such invisible radiation, the Court concluded that there is no realm in which the states are guaranteed exclusive regulatory powers notwithstanding the federal government's delegated authorities. The fact that "but for the treaty the State would be free to regulate this subject itself" was irrelevant since "most of the laws of the United States . . . deal with matters which in the silence of such laws the state might regulate." *Id.* at 434. Furthermore, the Court reasoned, the Constitution altogether forbids the states to conclude treaties, leaving them "incompetent to act." *Id.* at 433. Thus, denying the federal government the power to conclude treaties on subjects beyond Congress' enumerated authorities, but in which there may be "a national interest of very nearly the first magnitude," would leave the nation without "a power which must belong to and somewhere reside in every civilized government." *Id.* at 433-35 (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903), *abrogated on other grounds by Sherrer v. Sherrer*, 334 U.S. 343, 353 (1948)). Relying upon many of the precedents already discussed, the Court therefore rejected Missouri's argument and upheld the law.

Some of the *amici* in the instant case suggest that allegedly unforeseen developments in modern treaty practice – in particular, the development of human rights treaties – warrant revisiting the holding of *Missouri*. But, to the contrary, history shows that the *Missouri* Court was well aware of the ramifications of its decision for the nascent field of human rights treaties. The Court nevertheless endorsed Justice Holmes' opinion because it was consistent with constitutional text, structure, original meaning, and precedent. While human rights treaties have become more common over the later part of the twentieth century, they were not unknown or unforeseen in the 1920s. At the very moment *Missouri* was decided, the Senate was considering the Treaty of Versailles, which created the International Labor Organization. This provoked extensive public discussion of potential labor treaties governing matters such as child labor and wage and hour regulations. *See* Golove, *Treaty-Making*, *supra*, at 1267-68. Indeed, one of the briefs in *Missouri* argued that upholding the Migratory Bird Treaty Act would mean that, if the United States became party to the Versailles Treaty, Congress would thereby be empowered "with constitutional authority to control the employment of labor in local industries, within each of the sovereign states, to determine the conditions of labor, to prescribe a minimum wage, to regulate hours of labor, to prohibit child labor, and to determine the innumerable questions of a similar character which have always been supposed to be a

matter of state regulation." Brief for the State of Kansas, Amicus Curiae, at 28-29, 43, *Missouri v. Holland*, 252 U.S. 416 (1920). Under *Hammer v. Dagenhart*, 247 U.S. 251 (1918),[6] decided only two years before *Missouri*, child labor laws were as outside federal legislative power as the 1913 Migratory Bird Act had been; but the *Missouri* Court did not blanche at the prospect that a labor treaty could change that.

The holding of *Missouri* was consistently affirmed in subsequent rulings during this period. In *Asakura v. City of Seattle*, 265 U.S. 332 (1924), this Court ruled that the Treaty of Commerce and Navigation of April 5, 1911 with Japan trumped an inconsistent municipal ordinance regulating pawnbrokers. *Id.* at 343. As the Court explained, "[t]he treaty-making power of the United States is not limited by any express provision of the Constitution," but rather, "extend[s] to all proper subjects of negotiation between our government and other nations." *Id.* at 341. Moreover, "[t]he rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws." *Id.*; *see also Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) (upholding treaty over state inheritance tax law and noting that "as the treaty-making power is

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[6] A few decades later, of course, this Court would overrule *Hammer* in *United States v. Darby*, 312 U.S. 110, 116-17 (1941), having learned, from decades under an incoherent Commerce Clause jurisprudence, "the imprecision of content-based boundaries used without more to define the limits of" federal power. *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments"); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (upholding treaty governing disposition of intestate aliens' property at death over a New York statute, noting that "[t]he treatymaking power is broad enough to cover all subjects that properly pertain to our foreign relations").

In short, far from being an ill-considered novelty, *Missouri* was strongly supported by precedent and has been followed in the ninety years since it was decided.

III. Attempts To Amend The Constitution To Narrow The Treaty Power Were Rejected In The 1950s.

Even assuming *arguendo* that conditions of the world have changed so dramatically since the Founding Period that constriction of the treaty power could be considered appropriate, as Petitioner's *amici* argue, there is a mechanism for doing that: constitutional amendment. Indeed, opponents of human rights treaties in the 1950s attempted precisely this path with a series of proposed amendments to the Constitution known as the Bricker Amendments. But these constitutional amendments were soundly rejected after extensive debate, and this Court should not now accept the invitation of petitioner and *amici* to overstep the separation of powers and amend the Constitution by judicial fiat.

A. Supporters Of The Bricker Amendments In The 1950s Tried Unsuccessfully To Constrict The Treaty Power.

In the 1950s, defenders of racial segregation were concerned about the potential for treaties to be a tool against racial discrimination. The U.N. Charter referred to protection of human rights as one of the goals of the post-war world order, and the Universal Declaration of Human Rights received the support of the Truman administration and the U.N. General Assembly in 1948. While the Universal Declaration itself was nonbinding, work soon began on drafting the two foundational human rights treaties that would ultimately be known as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Creative litigants had already tried to use the references to human rights in the U.N. Charter in dozens of cases to attack racially discriminatory laws. *See* Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 Iowa L. Rev. 901, 917-48 (1984). The isolationist President of the American Bar Association, Frank Holman, warned that a white motorist who struck and killed a black child could be hauled off to face international trial under the Genocide Convention. Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* 13 (1988).

Stoking fears generated by these developments, Senator John Bricker introduced a series of proposed constitutional amendments that would have limited the treaty power. Several versions of the amendment were proposed over a span of a few years. Many

included language – which critics said was circular – to the effect that treaties conflicting with the Constitution would have no effect. *See* Stephen E. Ambrose, *Eisenhower: The President* 68 (1984) (quoting President Eisenhower as having disparaged the amendment as "an addition to the Constitution that said you could not violate the Constitution"). But more far-reaching versions included language known as the "which" clause, which would have overruled *Missouri* by providing that a treaty "shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty [*sic*]." Tananbaum, *The Bricker Amendment Controversy*, *supra*, at 91-92.

In terms echoing some of the *amici* in this case, Bricker and his supporters argued amendment of the Constitution was necessary because otherwise international human rights treaties would be used to "control and regulate all education, including public and parochial schools, it could control and regulate all matters affecting civil rights, marriage, divorce, etc; it could control all our sources of production of foods and the products of the farms and factories; . . . it could regiment labor and conditions of employment." Frank E. Holman, *The Story of the "Bricker Amendment"* 38 (1954). Moreover, Bricker claimed, international treaties were "an attempt to repeal the Bill of Rights," a threat to freedom of religion, and "a blueprint for tyranny." 82 Cong. Rec. 97, 8255 (1951).

B. The Bricker Amendments Were Rejected Because It Would Have Crippled The Nation's Ability To Conduct Foreign Policy.

The Eisenhower administration led the opposition to the Bricker Amendments. President Eisenhower recognized that the Bricker Amendments – like the rule advocated by Petitioner and her *amici* in the instant case – would force the "Administration to represent 49 governments in its dealings with foreign powers, whereas he was convinced that in foreign affairs there could be only one United States." Memorandum by the Assistant White House Staff Secretary (Minnich) (Jan. 11, 1954), *in* 1 *Foreign Relations of the United States, 1952-1954*, at 1832 (William Z. Slany et al. eds., 1983); Letter from President Eisenhower to William F. Knowland, Majority Leader (Jan. 25 1954), *in Foreign Policy*, Congressional Quarterly Almanac 10 (1954) (stating proposed amendment would "shackle the federal government so that it is no longer sovereign in foreign affairs," and that it would show "to our friends as well as our enemies abroad that our country intends to withdraw from its leadership in world affairs"). The administration feared a return to the problems of the Articles of Confederation, "when American Ambassadors were subject to ridicule abroad because [they] represented thirteen states, not one central government." Tananbaum, *The Bricker Amendment Controversy*, *supra,* at 138.

As an illustration of the difficulties that would be posed by the amendment, the State Department submitted to Congress a list of eighty-four treaties negotiated between 1920 and 1955 that would not have been enforceable if the "which" clause were

adopted because they addressed "subject matter not within the delegated powers of the Congress and which in the absence of treaty is reserved to the jurisdiction of the States." *Hearing, Treaties and Executive Agreements Before the Sen. Judiciary Comm.*, 986-92 (1955). In the end, opposition was so strong that the version of the amendment that finally came to a vote in the Senate omitted the "which" clause. Tananbaum, *supra*, at 139-43, 148, 153. Even the weaker versions of the amendment were rejected, however, and the only version that came close to passage in even one house of Congress concerned executive agreements (concluded solely by the President) rather than treaties. *Id.* at 169-81.

In the aftermath of the Bricker Amendments controversy, this Court's opinion in *Reid v. Covert* reassured the nation that treaties could not be used to supersede Bill of Rights guarantees while reaffirming the essential holding of *Missouri*. 354 U.S. 1, 14, 18 (1957) (holding that treaties cannot abrogate individual rights while reaffirming *Missouri* and noting that "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government, and the Tenth Amendment is no barrier"). Since then, this Court has continued to emphasize the preemptive force of treaties over state law. *See, e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187, 190-91 (1961) (finding that an Oregon law prohibiting the inheritance of Yugoslavian relatives of property within the state was inconsistent with and must give way to agreements between the U.S. and Yugoslavia and an 1881 treaty); *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968) ("The several States, of course,

have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy." (citation omitted)); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) ("Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making.").

C. This Court Should Not Narrow The Scope Of The Treaty Power By Judicial Fiat.

The history of the treaty power indicates that at various points in the nation's history, detractors have attempted to cabin the treaty power on claims of federalism and states' rights. Those claims have consistently failed, as this Court has again and again reaffirmed the scope of the federal treaty power that the Founders put in place. Even the supporters of the failed Bricker Amendments knew that an amendment was the only proper method for revising the scope of the treaty power. This Court should not accept the invitation of Petitioner and her *amici* to overrule over two centuries of precedent and embark on an uncharted course of judicial activism in foreign affairs. Text, structure, original meaning, and precedent all support only one conclusion in this case: the treaty power is an independent grant of authority to the federal government that was not intended to be limited by a judicially-imposed constraint on the

substantive topics treaties may address based on vague reserved police powers of the states. Nor should this Court invent an amorphous test that would call on courts to second-guess the considered judgment of the branches entrusted with the nation's foreign policy as to what genuinely implicates matters of international concern. Instead, the Court should leave settled precedent well enough alone.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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BRIEFS

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Supreme Court of the United States

CAROL ANN BOND, *Petitioner*,
v.
UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF *AMICUS CURIAE* OF U.S. CONGRESSMAN STEVE STOCKMAN, GUN OWNERS FDN., GUN OWNERS OF AMERICA, CITIZENS UNITED'S AMERICAN SOVEREIGNTY ACTION PROJECT, U.S. JUSTICE FDN., THE LINCOLN INSTITUTE, INSTITUTE ON THE CONSTITUTION, THE ABRAHAM LINCOLN FDN., DOWNSIZE DC FDN., DOWNSIZEDC.ORG, POLICY ANALYSIS CENTER, CONSERVATIVE LEGAL DEF. AND ED. FUND, AND TENTH AMENDMENT CENTER IN SUPPORT OF PETITIONER

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Federalist No. 75 18
The Federalization of the Criminal Law (ABA: 1998) 10, 11
Oliver Wendell Holmes, Jr., The Common Law, Univ. of Toronto Law School, Sept. 21, 2011 . 30
N. MacFaruhar, "U.N. Treaty is First Aimed at Regulating Global Arms Sales," (*New York Times*, Apr. 2, 2013) 26, 27
W. Rawle, A View of the Constitution of the United States, reprinted in 4 The Founders' Constitution, Item 13, pp. 571-72 (Kurland, P. & Lerner, R., eds.: Univ. Chi. Press: 1987) . . 24
2 J. Story, Commentaries on the Constitution (5th ed., Little, Brown 1891) . . . . . 18, *passim*
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INTEREST OF *AMICI CURIAE*[1]

Steve Stockman is a Member of the United States Congress representing Texas' 36th Congressional District. Among other committee assignments, of particular relevance to the constitutional treaty power at issue in this case, he serves as a Member of the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations of the House Foreign Affairs Committee.

Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Downsize DC Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Gun Owners of America, Inc., Citizens United (and its American Sovereignty Action Project), The Abraham Lincoln Foundation for Public Policy Research and Downsize DC.org are exempt from federal income tax under IRC section 501(c)(4). The Institute on the Constitution and the Tenth Amendment Center are educational organizations.

Each of the organizational *amici curiae* was established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public on important issues of

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[1] It is hereby certified that the parties have consented to the filing of this brief and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

national concern, such as the construction of state and federal constitutions, and criminal and regulatory statutes, federal and state issues.

Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund filed an *amicus curiae* brief (Dec. 10, 2010) in support of the petitioner in Bond v. United States, 546 U.S. ___, 131 S.Ct. 2355 (2011).[2]

SUMMARY OF ARGUMENT

This case involves an everyday crime, involving an attempt by one person to injure another, and which fully justified normal state prosecution. There was no reason to make a federal case out of it, as the prosecution did below.

Betrayed by her best friend, Carol Anne Bond attempted to injure the woman through the use of toxic chemicals. Instead of turning the case over to local authorities for investigation and prosecution, the United States Postal Inspection Service, acting outside its narrow authority, turned a local offense into a federal chemical weapons crime, under a statute purportedly enacted by Congress pursuant to the treaty power conferred upon the President and the Senate by Article II, Section 2, Clause 2.

Unfortunately, this federalization of the criminal law has become commonplace. Instead of staying

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[2] http://lawandfreedom.com/site/constitutional/Bond_Amicus.pdf.

within the boundaries of its constitutionally enumerated powers, Congress has acted as if it has plenary police power to penalize inherently state and local conduct.

That is precisely what happened here. Bond was convicted under a statute that was allegedly designed to enforce the nation's obligation under the "Geneva Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons," but was written so incredibly broadly as to reach ordinary household cleaning products. Although she had done nothing even remotely connected to the purpose of the treaty, she was convicted under a statute that requires no evidence of any disregard for the value of human life.

Bond's prosecution not only was misdirected, but also is the product of an unconstitutional abuse of power. The Geneva Convention is a non self-executing treaty. While it is the law of the land, it is not legally enforceable against an individual, but only morally enforceable based on the good faith of the signatory nations. In order for it to apply to a person, Congress must enact a criminal statute pursuant to one of its enumerated powers. Here, the Government argued, and the courts accepted, that the Necessary and Proper Clause permits Congress to punish individual conduct so long as there is a "rational relationship" between the statute and the treaty. This is error. In order for Congress to have the power to act, the purpose of the statute must coincide with the purpose of the treaty. Here, the statute does not prevent any nonstate activity that could lead to the development

and use of chemical weapons in warfare. To the contrary, the language of the statute sweeps so broadly that it makes it a federal crime to pour bleach in another person's fish tank.

Not only is the statute outside any enumerated power, it also violates the Tenth Amendment, which prohibits the federal government from exercising powers reserved to the states and to the people. The Tenth Amendment makes express what is otherwise implied by the structure of the Constitution. As this Court so eloquently stated in 2011 in Bond v. United States, the Amendment's express prohibition on the use of power protects individual liberty. It ensures that the people of each State will not be governed by some remote national or international government entity about matters concerned with their safety, health, and welfare,

Despite this Court's decision in Bond, the court below decided that it was bound by Missouri v. Holland, a case decided, eighty-six years before. The court read Holland's expansive language expansively, and held that the treaty power vests in the federal government a plenary "acquirable police power" to do just about anything it wants.

Petitioner argues that Holland can be read narrowly and, by ignoring certain parts, minimized, so as to permit a Tenth Amendment victory in this case. Petitioner's sanguinity is misplaced. Holland sweeps away any constitutional barrier to the reach of the treaty power, treats the Tenth Amendment as if it did not exist, and grants Congress plenary power to enact

any law on any subject covered by a treaty. In short, the Holland opinion is a blatant and unavoidable affront to a constitutional government of limited powers. It must be confronted — and overruled.

ARGUMENT

I. A PERSONAL VENDETTA HAS BEEN UNJUSTIFIABLY PROSECUTED AS A FEDERAL CRIME.

A. A Domestic Dispute Was Needlessly Made into a Federal Case.

The facts of this case read like an Agatha Christie novel, in that "[m]urder by poisoning was the theme of more than half of [her] novels, plays and short stories."[3] As Agatha Christie learned "a lot about poisons from her work ... in a hospital pharmacy,"[4] Carol Anne Bond, a "trained microbiologist" employed by a chemical manufacturer, learned that certain "chemicals have the rare ability to cause toxic harm to individuals through minimal topical contact." United States v. Bond, 581 F.3d 128, 131-32 (3d Cir. 2009) ("Bond I").

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[3] "Agatha Christie's Murders by Poisoning," A Blog for English Lovers, Dec. 18, 2009, http://speakin-colors.blogspot.com/2009/12/blog-post_7208.html ("Christie Murders Blog").

[4] *Id.*

However, unlike Christie who applied her knowledge of poisons to writing fiction,[5] Bond applied her knowledge to a real-life effort to harm her former closest friend, who had been impregnated by Bond's husband. *Id.* Vowing revenge, in a highly personalized vendetta, Bond "attempted to poison" her adulterous neighbor "at least 24 times over the course of several months." *Id.*, 581 F.3d at 132. Bond "spread [chemicals] on [her neighbor's] home doorknob, car door handles, and mailbox." *Id.* Her neighbor suffered no injury until "on one occasion [when she] sustained a chemical burn to her thumb." *Id.* Initially, the neighbor reported these "chemical attacks" to the local police, who apparently took no action. *Id.* Dissatisfied, the neighbor "complained to her local postal carriers about the chemicals on her mailbox." *Id.*

Based on this single complaint, the United States Postal Inspection Service swung into action, and decided to make a federal case out of a domestic dispute, "placing surveillance cameras in and around [the target neighbor's] home." *Id.* The cameras caught Bond "opening [the neighbor's] mailbox, stealing a business envelope, and placing potassium dichromate inside [the neighbor's] car muffler." *Id.* Prompted by the muffler discovery, the postal inspectors successfully "trace[d] the origin" of the chemical to Bond's employer, and "determined that nearly four pounds of potassium dichromate were missing from a common storage area to which Bond had access." *Id.*

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[5] *See, e.g.*, Christie Murders Blog.

Armed with this evidence, the postal inspectors obtained both an arrest warrant for Bond and a search warrant for her car and home. *Id.* While searching Bond's home, other postal inspectors seized "a piece of [the neighbor's] mail and amounts of the chemicals in Bond's home and car." After arresting Bond, the postal inspectors "took her to a holding cell in the Philadelphia Post Office." *Id.*

Thereafter, federal prosecutors obtained a grand jury indictment against Bond, charging her "with two counts of mail theft, in violation of 18 U.S.C. § 1708," and two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. section 229(a)(1). In the district court, Bond moved unsuccessfully to suppress the evidence seized from her home and to dismiss the two chemical weapons counts. *Id.* After her motions were denied, Bond pled guilty to all charges, reserving the right to appeal. Bond was sentenced to six years imprisonment.

B. The Investigation of a Private Mailbox Metamorphosed into a Chemical Weapons Case.

Although 18 U.S.C. section 3061(a) authorizes postal inspectors "to investigate criminal matters related to the Postal Service and the mails," that authority is expressly limited by 18 U.S.C. section 3061(b), which states that these investigative powers "shall be exercised **only** ... in the enforcement of [i] laws regarding property in the custody of the Postal Service, property of the Postal Service, the use of the mails, and other postal offenses," or [ii] other laws that, as

agreed to by the Attorney General, "have a detrimental effect upon the operations of the Postal Service." (Emphasis added.)

The Postal Inspection Service investigation stretched well beyond these limitations. From the outset of its investigation into Bond's neighbor's complaint, it began with surveillance cameras "in and around" the neighbor's home, and included a search of the premises of Bond's employer. Bond I, 581 F.3d at 132. The postal inspectors obtained an arrest warrant for Bond and search warrants for Bond's car and home, with incarceration occurring, remarkably, in a post office. *Id.*

In the end, Bond's indictment was only tangentially related to "the Postal Service and the mails." To be sure, Bond was indicted on two counts of mail theft in violation of 18 U.S.C. section 1708, but those charges were based upon the happenstance discovery of (i) a business envelope Bond took from her neighbor's mail box, and (ii) a piece of the neighbor's mail found in Bond's house. These two mail counts in the indictment provided thin cover for postal inspectors having exceeded their statutory authority. The Postal Inspection Service reports that its inspectors "enforce more than 200 federal laws in investigations of crimes that may adversely affect or fraudulently use the U.S. mail, the postal system or Postal Service employees."[6] Yet, from this lengthy list, the Postal Service could

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[6] *See* http://about.usps.com/publications/pub278/welcome.htm.

find only incidental mail theft of a couple of envelopes on which to base charges.

Remarkably, the Postal Inspection Service never appeared concerned about the lack of a federal predicate for its investigation. From the outset, the Postal Inspection Service did not hesitate to assume plenary police powers, even though its enforcement powers are expressly limited by 18 U.S.C. section 3061. The postal inspectors simply could have referred the case to the local police or county sheriff. Instead, they insisted on taking the lead in the investigation, up to and including incarcerating Bond in their own offices.[7] Failing to honor its limited mandate, the postal investigators turned a local crime, routinely prosecuted by local government authorities, into a federal case, with international implications.

C. Charging and Convicting Bond of a Violation of 18 U.S.C. Section 229(a)(1) Is Disproportionate to and Misdirected from the Blameworthiness of Her Conduct.

The enthusiasm of the Postal Inspection Service to intrude upon the state police power is fully consistent with the modern trend toward federalization of the criminal law. As documented by the American Bar Association Task Force on the Federalization of Criminal Law, "[t]he fundamental view that local

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[7] In 1971, the Postal Service lost its status as a department of government, and was spun off as a quasi-independent entity, described "as an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201.

crime is, with rare exception, a matter for the states to attack has been strained in practice in recent years"[8]:

> Congressional activity making essentially local conduct a federal crime has accelerated greatly, notably, in areas in which existing state law already criminalizes the same conduct. This troubling federalization trend has contributed to a patchwork of federal crimes often **lacking a principled basis**. [ABA Report, p. 5 (emphasis added).]

It is clear that this case also lacks that "principled basis." As the court of appeals below observed in a lengthy, and candid footnote: "The government has, at different stages of this case, been willing to jettison one legal position and adopt a different one, as seemed convenient"[9]:

> [i]t expressly disclaimed the *Commerce Clause* as a basis for Congress's power to approve the [Chemical Weapons Convention Implementation Act of 1998].... The government still maintained that position the first time it appeared before us, relying only on the Necessary and Proper Clause in support of the Act's constitutionality. Once before the Supreme Court, however, the government decided that this is really a

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[8] *See* The Federalization of the Criminal Law (ABA: 1998). ("ABA Report"). p. 5 (1998).

[9] United States v. Bond, 681 F.3d 149, 152 n.1 (3d Cir. 2012) ("Bond II").

> *Commerce Clause* case, and that the position it had pressed before us is secondary. [Bond II, 681 F.3d at 152 n.1.]

Indeed, all too often, Congress treats the Constitution's enumerated powers as a grab bag of potential authority to criminalize private behavior, unmoored to either constitutional text or history. Latching primarily upon the Commerce Clause, Congress has criminalized behavior based on a person merely crossing a state line. For example, in 1913 the Supreme Court upheld the Mann Act's prohibition of transportation of women for immoral purposes across a state line without requiring any evidence that the activity was commercial, or the law was a regulation of commerce, explaining that "Congress has power over transportation 'among the several states' [and] may [adopt] means [that] have the quality of police regulations." Hoke v. United States, 227 U.S. 308, 323 (1913). So, when this Court struck down the federal law against possession of a firearm in a school zone as outside the power of Congress under the Commerce Clause,[10] Congress responded with a new statute requiring proof that the firearm had moved in, or otherwise affects, interstate commerce. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, 110 Stat. 3009 (18 U.S.C. § 922(g)).

The ABA Report documented that 40 percent of all federal crimes enacted since the Civil War have been enacted since 1970. *Id.* at 7. That report also

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[10] *See* U.S. v. Lopez, 514 U.S. 549 (1995).

established that "[n]ew crimes are often enacted in a patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." *Id.* at 14–15. Instead of honoring the "deeply rooted principle that the general police power resides in the states — and that federal law enforcement should be narrowly limited —" Congress continues to criminalize more and more conduct, in disregard of "the constitutional vision that the federal government should play a narrowly circumscribed role in defining and investigating criminal conduct...." *Id.* at 17.

Similarly here, 18 U.S.C. section 229 was enacted as part of the Chemical Weapons Convention Implementation Act of 1998, and yet the prohibitory language employed by Congress offers no indication that the section was adopted pursuant to any constitutionally enumerated power. *See* Bond I, 581 F.3d at 134. As the court of appeals below remarked in its examination of the statutory text, "[t]he Act's breadth is certainly striking, seeing as it turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." Bond II, 681 F.3d at 155 n.7.

As Petitioner amply demonstrates, the potential penalties for violation of section 229, and related statutes, are disproportionate to the blameworthiness of Bond's conduct. Brief of Petitioner ("Pet. Br.") at 7. Moreover, the sentence imposed upon Bond for violation of section 229 is much more severe when the sentence that she likely would have received under state law. *See* Pet. Br. at 11-12.

Further, the *mens rea* required to commit the offense defined by section 229 can be met by wholly innocent behavior. The *mens rea* required is the knowing possession or use. The prosecution need not prove that the user or possessor knew, or even should have known, that the chemical possessed or used was "toxic" within the meaning of the statute. As Petitioner points out, the statutory definition of a "toxic chemical" is "extraordinarily capacious," such that even ordinary household cleaning substances would be "presumptively a prohibited chemical weapon." *See* Pet. Br. at 8. While a defendant could rebut that presumption under either the exclusion or the exception for chemicals "intended for peaceful uses," the burden would be on the defendant, not the prosecution. By design, the "peaceful use" exception or exclusion is an affirmative defense.

In contrast, for example, in a prosecution under the Pennsylvania criminal code for a violation of either the assault or aggravated assault statute, it would be the prosecution's burden to demonstrate in a criminal assault trial that the defendant knowingly, intentionally, or recklessly "caused bodily harm." 18 Pa. Cons. Stat. § 2701. Or, in a case such as the one against Bond, a prosecution for aggravated assault would require proof of an "attempt[] to cause serious bodily injury to another ... intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." 18 Pa. Cons. Stat. § 2702. Either charge would be based upon the degree of Bond's culpability in her various attempts to misuse chemicals to cause serious bodily harm to her neighbor.

From the initial investigation, through the prosecution in this case, up to the Supreme Court and back again, there has been no recognition that the substitution of a "possession" or "use" statute — which could extend to the "pouring [of] a bottle of vinegar in [a] friend's goldfish bowl"[11] — cheapens the moral disapproval that otherwise would attach to Bond's conduct. Stripped of the moral foundation of traditional criminal law, the prosecution here undermines the rich moral precepts that undergird the exercise of the police power traditionally exercised by the States in our federal system. Under the American constitutional republic, it is the several states, not the federal government, that are the repositories of that moral capital.

II. 18 U.S.C. SECTION 229 CONSTITUTES AN UNCONSTITUTIONAL ABUSE OF FEDERAL POWER.

A. The Geneva Protocol Concerns the Misuse of Chemical Weapons in Warfare among Nations.

Spurred by the horrors of the use of chemical weapons in World War I, world leaders met in Geneva, Switzerland and, in 1925, as part of the Geneva Conventions, the convening nations signed a document entitled "Protocol for the **Prohibition of the Use in War** of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare" ("Protocol")

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[11] *See* question posed by Justice Alito, Transcript of Oral Argument at 29. Bond v. United States, 131 S. Ct. 2355 (2011).

(emphasis added).[12] However, the Protocol "did not prohibit the development, production or stockpiling of chemical weapons."[13] It was not until September 3, 1992 that the Conference on Disarmament in Geneva adopted the "Convention on the **Prohibition of the Development, Production, Stockpiling and Use** of Chemical Weapons and on Their Destruction" ("the Convention") (emphasis added),[14] which was signed on January 13, 1993.[15] The United States Senate ratified the treaty on April 25, 1997,[16] and the treaty entered into force on April 29, 1997.[17]

Article I, Section 1.a-b of the treaty[18] prohibits State Parties from undertaking activities "[t]o develop, produce, otherwise acquire, stockpile ...use... retain ... or transfer ... chemical weapons...." Article VII, Section 1.a of the treaty, entitled "National Implementation Measures," requires that "[e]ach State

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[12] http://www.un.org/disarmament/WMD/Bio/pdf/Status_Protocol.pdf. Little did the signers of this document know that their warfare treaty between nations would criminalize certain behavior by a scorned Pennsylvania housewife.

[13] http://www.un.org/disarmament/WMD/Chemical/.

[14] *Id.*

[15] 32 I.L.M. 800 (1993).

[16] S.RES.75, 105th Congress, http://www.gpo.gov/fdsys/pkg/BILLS-105sres75ats/pdf/BILLS-105sres75ats.pdf.

[17] http://www.fas.org/nuke/control/cwc/chron.htm.

[18] 32 I.L.M. 800 (1993).

Party shall, **in accordance with its constitutional processes**, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall ... [p]rohibit natural and legal persons anywhere on its territory ... from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity...."

The Senate ratification (S.Res.75) confirmed that it "advise[d] and consent[ed] to the ratification of the Convention ... subject to the following conditions...." Section 2, subsection (12) of that resolution is entitled "Primacy of the United States Constitution," and states that "[n]othing in the Convention requires or authorizes legislation, or other action, by the United States **prohibited by the Constitution** of the United States, as interpreted by the United States" (emphasis added). Further, Section 2, subsection (28) states that, "[i]n order to protect United States citizens against unreasonable searches and seizures ... for any challenge inspection conducted on the territory of the United States ... the United States National Authority will first obtain a criminal search warrant based upon probable cause, supported by oath or affirmation, and describing with particularity the place to be searched and the persons or things to be seized...." This requirement to obey the Constitution while implementing the treaty is echoed by section 305 of Public Law 105-277 (codified at 22 U.S.C. § 6725), the implementing statute. Thus, Congress took steps to ensure the treaty and implementing statute be interpreted consistent with the Constitution.

In 1998, as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act,[19] Congress enacted the Chemical Weapons Convention Implementation Act of 1998, now codified at 18 U.S.C. section 229, *et seq*. 18 U.S.C. section 229(a) mirrors the language of the treaty, while adding certain additional prohibitions, stating that "it shall be unlawful for any person knowingly ... to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, **own**, **possess**, or use, or **threaten to use**, any chemical weapon; or ... to **assist or induce** ... or to **attempt or conspire**..." (emphasis added).

The treaty discusses "state parties," not individuals; it clearly has the purpose to stop chemical warfare, and prevent the use of chemical weapons by state actors. It does not appear to envision affecting individuals, other than the requirement for legislation prohibiting non-state actors from acquiring and using chemical weapons. However, Congress erroneously assumed that it had plenary power to enact section 229 pursuant to the treaty power, subject only to certain express prohibitions protecting individual rights in the Bill of Rights. *See* Reid v. Covert, 354 U.S. 1, 16-18 (1957).

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[19] 105 P.L. 277; 112 Stat. 2681, http://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf.

B. Section 229 of the Chemical Weapons Convention Implementation Act Is an Unconstitutional Means to Meet the U.S. Treaty Obligation.

The Convention is not a self-executing treaty. *See* Pet. Br., at 3-5. Rather, it is simply an "agreement[] between sovereign and sovereign." *See Federalist No. 75*, p. 388 (G. Carey and J. McClellan, eds., Liberty Fund: 2001). Therefore, "[i]ts object[] [is a] CONTRACT with foreign nations which ha[s] the force of law, but derive[s] it from the obligation[] of good faith." *Id.* The Convention's provisions, then, "are not rules prescribed by the sovereign to the subject." *Id.* In summing up this original understanding of the nature of the legal obligation of a non-self-executing treaty, Joseph Story explained:

> The power of making treaties is plainly neither [legislative] nor [executive]. It relates neither to the execution of subsisting laws, nor to the enactment of new ones; and still less does it relate to the exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law with us, but, as to foreign sovereigns, have only the obligation of good faith. Treaties are not rules prescribed by the sovereign to his subjects; but agreements between sovereign and sovereign. [2 J. Story, Commentaries on the Constitution, § 1519, p. 346 (5th ed., Little, Brown 1891).]

To be sure, as a treaty made under the authority of the United States, the Convention is the Supreme Law

of the Land, legally binding upon the nation, but that does not mean that it is anything more than a contractual obligation, enforceable against the United States.[20] As St. George Tucker observed, a treaty "should be regarded as a part of the supreme law of the land [and] the honour and peace of the nation certainly require that its compacts should be duly observed, and carried into effect with perfect good faith." St. G. Tucker, View of the Constitution of the United States, p. 270 (Liberty Fund: 1999) ("Tucker's View"). In short, a treaty is "an inchoate act" (*id.*), the international enforcement of which depends upon the good will among nations, and the domestic enforcement by laws enacted by Congress according to the powers vested in it by the Constitution:

> [W]hen a treaty stipulates regulations on any of the subjects submitted by the constitution to the power of Congress, it must depend on its execution, as to such stipulations, on a law or laws to be passed by Congress; and it is the constitutional right and duty of the house of representatives, in all such cases, to deliberate on the expediency, or inexpediency, of carrying the treaty in effect, and to determine and act thereon, as in their good judgment, may be most conducive to the public good. [*Id.* at 271-72.]

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[20] *See* Medellin v. Texas, 552 U.S. 491, 505 (2008) ("A treaty is, of course, 'primarily a compact between nations' ... it ordinarily depends for enforcement of its provisions on the interest and honor of the governments which are parties to it.").

Tucker concluded that any "contrary construction would render the power of the president and senate paramount to that of the whole congress, even on those subjects upon which every branch of congress is, by the constitution, required to deliberate." *Id.* at 277.

In Bond I, and in recognition that Congress does not have plenary power to enact laws enforceable against the people, the government argued that Congress was empowered by the Necessary and Proper Clause to enact section 229 "as a law enforcing its Treaty Power." *Id.*, 581 F.3d at 134. Remarkably absent the lower court's first opinion is any effort to analyze this claim pursuant to the well-established rule in McCulloch v. Maryland, which requires a court to assess the purpose of the law and the legitimacy of that purpose.[21] *See* Bond I, 581 F.3d at 134-35, Instead, the court focused exclusively upon the Tenth Amendment claim, dismissing it on the ground of lack of standing. *Id.*, 581 F.3d at 135-38.

In Bond II, the court of appeals below addressed the Necessary and Proper question, but dismissed it by reference to a single statement in Missouri v. Holland,[22] that purportedly established that "the ...

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[21] 17 U.S. (4 Wheat) 316, 421 (1817) ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

[22] 252 U.S. 416 (1920).

relevant question is whether the underlying treaty is valid"[23]:

> In *Missouri v. Holland*, the Supreme Court declared that, if the treaty is valid, "there can be no dispute about the validity of the statute [implementing it] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." [Bond II, 681 F.3d at 152.]

Having relied solely upon Holland, the Bond II court below omitted the purpose analysis required by McCulloch. Instead, it assumed that Holland foreclosed any inquiry related to the purpose of section 229. Thus, the court ruled that the provision was constitutional under the Necessary and Proper Clause solely because it was "rationally related" to the implementation of a treaty. *See* Bond II, 681 F.3d at 157-58 and n.9. While the court below relied upon two decisions from its sister circuits, it did not — indeed, it could not — find any language in McCulloch to justify the dispensing of its purpose inquiry in the application of the Necessary and Proper Clause to congressional legislation implementing a treaty. Nor is there any good reason for such a dispensation. Rather, there is a very good reason to examine carefully the claimed purpose of a law purportedly enacted under the Necessary and Proper Clause as a means of enforcing a treaty domestically.

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[23] Bond II, 681 F.3d at 153.

Until the enactment of the Convention in 1998, the Geneva Convention on chemical weapons was enforceable only internationally as a contract between the United States and the other signatory nations. As a non-self-executing treaty, the Convention contained no rule enforceable against an American citizen. Section 229 changed that, its broad language "turn[ing] each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache ... [and] expos[ing] a person to years in federal prison." *See* Bond II, 681 F.3d at 155 n.7.

The far-reaching language of section 229 refutes on its face any notion that the section was enacted by Congress for the purpose of strengthening the nation's contractual obligation in the Geneva Convention. Section 229 does not read like a statute designed as a preventive measure or preemptive strike against nonstate activity that could lead to the development and use of toxic chemicals by the United States in warfare. On its face, section 229 is not designed as a prophylaxis to the misuse of chemicals in warfare, but as a pretext "for the accomplishment of objects not entrusted to the [federal] government" and, therefore, outside the power vested in Congress by the Necessary and Proper Clause. *See* McCulloch, 17 U.S. at 423.

C. Section 229 Violates the Tenth Amendment.

In his Commentaries on the Constitution, Joseph Story warned that the treaty power vested in the President and the Senate, although "general and

unrestricted," it is "not be so construed to destroy the fundamental laws of the State"[24]:

> A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. [*Id.* at 339.]

There is no more fundamental provision in the United States Constitution than the Tenth Amendment in the Bill of Rights. As this Court unanimously concluded in Bond v. United States[25]:

> The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with state sovereignty is not within the enumerated powers of the National Government ... and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States. [Bond III, 131 S. Ct. at 2366.]

Feeling bound by Missouri v. Holland's crabbed view of the Tenth Amendment, the court below departed from this high view of the Tenth Amendment's

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[24] 2. Story's Commentaries, § 1508, at 339. *See also* St. G. Tucker, Limitations on the Treat-Making Power, § 122, p. 139 (Law Book Exchange, N.J.: 2000).

[25] 564 U.S. __, [illegible]t. 2355 (2011) ("Bond III").

protective reach. However, the Holland court neglected the Amendment's history and original purpose. *See* Bond II, 681 F.3d at 156. As noted above, Joseph Story warned against an expansive interpretation of the treaty power that could "annihilate" other authorities, "chang[ing] the organization of government [or] overturn[ing] its republican form." *See* Story's Commentaries at 339. Confidently, Story contended that any such treaty would be found "void; because it would destroy, what [the constitution] was designed ... to fulfill, the will of the people." *Id.* St. George Tucker likewise worried that, because "there is no[] restriction as to the subjects of treaties," there were only two constitutional guarantees that protected the States, the one securing to the states "a republican form of government" and the other securing the States' authority to self-protection against invasions. Tucker's View at 269. In sum, both Story and Tucker cautioned that the treaty power not be read in a way that, in Tucker's words, would "dismember[] the federal republic." *Id.*

But that is precisely what the court below seems to have decided in its reliance on Justice Holmes's opinion in Holland, ruling that, while there is "[n]o doubt the great body of private relations usually fall within the control of the State ... a treaty may override its power." Holland, 252 U.S. at 434.

At the heart of the constitutional guarantee of a republican form of government to every state is the principle that the laws are to be enacted by the representatives of the people of each State. *See* W. Rawle, A View of the Constitution of the United

States, reprinted in 4 The Founders' Constitution, Item 13, pp. 571-72 (Kurland, P. & Lerner, R., eds.: Univ. Chi. Press: 1987). In turn, the Tenth Amendment reserves to the States powers not delegated to the federal government. Traditionally, the powers reserved to the States are commonly known as the police powers, including public safety, health, and welfare. Under the guise of implementing the Convention against the use of toxic chemicals in warfare among nations, Congress has enacted section 229, utilizing such broad language that it invades the States' sovereign police powers. If allowed to stand, it will introduce a wholly new chapter of the transfer of power from the States to the federal government via the treaty power, in a world that is increasingly trending toward the internationalization of human rights, imposing upon states "obligation[s] to protect ... civil and political rights or economic, social and cultural rights." *See* T. Buergenthal, D. Shelton, & D. Stewart, International Human Rights in a Nutshell, p. 27 (4th ed. 2009). In this contemporary drive for increasingly transnational enforcement of universal norms is the "widespread international political acceptance of the proposition that democracy is a precondition for the effective protection of human rights." *Id.* at 26.

At stake, then, in the setting of constitutional parameters to the treaty power is whether the American federal republic, in which powers are divided between a national and several State governments, will survive, or whether the treaty power will be used to "annihilate" our system of checks and balances that otherwise would stand in the way of a national

democracy unlimited by independent and sovereign States.

The overriding design and purpose of the Tenth Amendment is to secure America's federal structure so as to better secure and preserve "individual liberty." *See* Bond III, 131 S. Ct. at 2364. The Amendment does that by ensuring that "the enactment of positive law [is left] to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id.* To that end, the treaty power must be made subordinate to the Tenth Amendment, first because it is a power that can be exercised unchecked by the House, which is the legislative branch of the national government closest to the people. Second, the treaty can be misused as a vehicle to transfer the power reserved to the people and to the States to international bodies, disenfranchising the people of the several States and imposing upon the people of the States a totally foreign political or moral standard.

Indeed, on April 2, 2013, the United Nations General Assembly overwhelmingly "approve[d] a pioneering treaty aimed at regulating the enormous global trade in conventional weapons, for the first time linking sales to the human rights records of the buyers." N. MacFaruhar, "U.N. Treaty is First Aimed at Regulating Global Arms Sales," (*New York Times*, Apr. 2, 2013).[26] The object of the treaty is not

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[26] http://www.nytimes.com/2013/04/03/world/arms-trade-treaty-approved-at-un.html?nl=todaysheadlines&emc=edi

commercial. Rather, it purportedly "reflects growing international sentiment that the multibillion-dollar weapons trade needs to be held to a **moral standard**." *Id.* (emphasis added). Indeed, the treaty "calls for sales to be evaluated on whether the weapons will be used to break humanitarian law." Such an international gun control treaty could not only serve as a pretext for centralizing the regulation of firearms in the United States, but also as a pretext for globalizing gun control, including a ban on so-called "assault weapons." While the Second Amendment would stand as a bulwark against numerous measures that might be enacted by Congress, the Tenth Amendment is the front-line defense of the right of the people of each state to set the moral standards governing the transfer and use of firearms within their respective local jurisdictions.

III. MISSOURI V. HOLLAND SHOULD BE OVERRULED.

A. Missouri v. Holland's Rejection of the Tenth Amendment Cannot Be Ignored as Dicta.

Petitioner's brief minimizes the impact of Missouri v. Holland, arguing only in the alternative that "[t]o the extent *Holland* is to the contrary, it would need to be overruled." Pet. Br. at 18. Petitioner argues that the court below misinterpreted and "broadly construed *Holland*," arguing that "*Holland* does not stand for

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th[e] alarming proposition" that the treaty power can be used to override the "structural constraints on Congress' power." *Id.* at i, 17. Unfortunately, *amici* do not believe Holland can be construed away so easily. It is Holland's language that is expansive, not merely the lower court's reading of it. Holland was plain error. The Court should recognize this error and correct it, rather than rationalizing it away, allowing it to continue to fester.

Petitioner characterizes Holland's expansive view of the treaty power as nothing more than "dictum." *Id.* at i. Petitioner argues that "the constitutional attack and this Court's reasoning [in Holland] focused on the validity of the treaty," whereas the focus of this case is the constitutionality of the implementing statute. *Id.* at 17. Petitioner argues that the Court in Holland addressed the statute "[a]lmost in passing." *Id.* at 17.

But there is not just a single "dictum" in Holland that can be conveniently ignored. Rather, the opinion is chock full of perversely unconstitutional statements. Holland declared that the government's treaty power is, in essence, extra-constitutional, stating that "[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." *Id.*, 252 U.S. at 433. Holland explicitly states that there are subjects "that an act of Congress could not deal with but that a treaty followed by such an act could...." *Id.*

On the contrary, the "authority of the United States" is limited to that which is delegated by the

Constitution. Contrary to Holland, the government has no reservoir of "'power which must belong to and somewhere reside in every civilized government....'" *See id.* Simply alleging that something is so obvious that it "must" be true does not make it true. There is nothing "inherent" about federal power — there is only what the Constitution says.

Simply because all other governments historically possess a power does not mean that our federal government possesses that power, especially since our form of government was designed to be a break with history, and a new experiment. Nowhere does the Constitution delegate "all powers which are so obvious that they must reside in every civilized government" — rather it denies the majority of power to the federal government, reserving it to the States, even though that may be power that other "civilized governments" generally possess.

The Holland Court viewed the Constitution as having "called into life a being the development of which could not have been foreseen...." *Id.* at 433. Thus, the Court decried the Constitution, stating that "the case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Id.*

This disregard is no wonder, since Holland was written by Justice Holmes, who believed that "[t]he life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which

judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Oliver Wendell Holmes, Jr., The Common Law, Univ. of Toronto Law School, Sept. 21, 2011, p. 5. Holmes embraced this notion, seeming to believe that the law — presumably including even the Constitution — should be used in "degree to which it is able to work out desired results...." *Id.*

In so many words, Holland rejects the Constitution's delineation of what powers the federal government **does** possess, and replaces it with the Court's vision of what powers a "civilized government" **should** possess. Thus, Holland cannot be ignored. It is an affront to a constitutional government of limited powers. It must be confronted — and overruled.

B. Not Only Was Holland's View of the Treaty Power Erroneous, Its Holding Was Based on an Outdated View of the Tenth Amendment.

In one of the most poorly reasoned opinions ever to be handed down by the Supreme Court, Missouri v. Holland, the Court held that the express delegation of the power to enter treaties meant that Congress could legislate — pursuant to a treaty — about anything which "does not contravene any prohibitory words to be found in the Constitution." 252 U.S. 416, 434 (1920). In other words, the Holland Court believed that the founders went to great trouble to craft an entire constitution of limited, enumerated powers —

and then undid it all through the grant of the treaty power.

According to Holland, all that a President and the Senate would need do is sign and ratify a bogus treaty with Canada, stating that each nation will "enact all statutes which are beneficial to the international community." Congress would then be free to enact any statute it wished, without limitation, so long as it did not contravene Congress' understanding of some "express prohibition" found in the Constitution.

But, of course, the Chemical Weapons Convention Implementation Act, like the Migratory Bird Treaty Act, does contravene prohibitory words disregarded by the Holland Court — specifically, those found in the Tenth Amendment — that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution grants to Congress neither the power to regulate birds in Missouri nor the power to regulate Bond's domestic misuse of a common photography chemical. The Holland Court chose to overlook this, instead mocking the Tenth Amendment's prohibition on federal power as mere "invisible radiation from ... general terms...." *Id.* at 434. At the time, the Tenth Amendment was regarded as nothing more than a "truism,"[27] simply an editorialization on the Constitution's federal structure of limited powers. Of course, that idea flies in the face of the most basic of tenets of constitutional

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[27] United States v. Darby, 312 U.S. 100, 124 (1941).

interpretation that "every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." Holmes v. Jennison, 39 U.S. 540, 570-571 (1840).

As the Court below recognized, Missouri v. Holland stands for the proposition that Congress may use the treaty power to circumvent any limitation imposed by the Tenth Amendment, along with the "structural limitations on federal power."[28] Were it not for the treaty power, Congress never would have had the authority to enact the chemical weapons statute under which Bond was convicted.

The result in Missouri v. Holland may have seemed desirable to the Court — but it was hardly constitutional. The outcome of this case is neither desirable nor constitutional, but is simply the ruthlessly logical result of what Holland set into motion. Holland blessed the idea that, through the simple enactment of a treaty, our entire form of government could be transmorphed from one of limited, enumerated powers, to one where the President and the Senate hold plenary, "acquirable police power[s]." 681 F.3d at 170.

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[28] 681 F.3d 149, 151, 155 (3rd. Cir. 2012) ("Missouri v. Holland ... is sometimes cited for the proposition that the Tenth Amendment has no bearing on Congress' ability to legislate in furtherance of the Treaty Power....").

This Court in other cases has rejected such an absurd principle. In Reid v. Covert,[29] this Court recognized that "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government." *Id.* at 14.

The Court continued that "[t]he obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." Reid further stated that "[i]f our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there." *Id.*

To be fair, Reid v. Covert distinguished Holland, noting that "the treaty involved was not inconsistent with any specific provision of the Constitution." *Id.* at 18. But it did so based on a view of the Tenth Amendment which is now outdated, and should be

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[29] 354 U.S. 1, 15 (1957) ("At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents.").

Convention is not valid as applied to Bond. The President lacks authority under Article II to regulate Bond's conduct and, even assuming a treaty can effectuate a congressional power, *but see supra* at 13-14, Congress lacks authority under the Commerce Clause to criminalize this behavior. Because Bond's conduct is not the proper subject of a treaty, Congress cannot rely on the Necessary and Proper Clause for its implementing authority. If the Convention is unconstitutional as applied to Bond, the statute claiming to give it domestic effect is, too.

Second, applying the Act to Bond is not "necessary" to carry the treaty's legitimate aspects into execution. Her conviction is not even tenuously incidental to the President's foreign affairs powers. It is nearly impossible to imagine a scenario in which Bond's spiteful actions might threaten global harmony or be seen as a violation of the Convention by the treaty's signatories. The links between Article II and Bond's crime are "too attenuated"—if they exist at all—to render this prosecution necessary to effectuate the treaty within its legitimate sphere of operation. *See Comstock*, 130 S. Ct. at 1963; *id.* at 1967 (Kennedy, J., concurring in the judgment) (requiring a "tangible link" to an enumerated Article I power "based on empirical demonstration").

Nor is Bond's conviction incidental to any commercial interest that the legislation might be vindicating. Whether analyzed under the Commerce Clause or the Necessary and Proper Clause the answer is the same: Congress may not "'pile inference upon inference' in order to establish that noneconomic activity has a substantial effect on ... commerce." *Raich*, 545 U.S. at 36 (Scalia, J., concurring in the judgment) (quoting *Lopez*, 514

U.S. at 567); *NFIB*, 132 S. Ct. at 2648 (joint dissent). Under the government's reasoning, a crime that involves *any* substance is ripe for federal prosecution because substances can be articles of commerce. This vision of federal power is in no way "narrow in scope," *Comstock*, 130 S. Ct. at 1964, and to embrace it "would open a new and potentially vast domain to congressional authority," *NFIB*, 132 S. Ct. at 2587 (Roberts, C.J.).

Third, and most importantly, applying the Act to Bond is not "proper." "It is of fundamental importance to consider whether essential attributes of state sovereignty are compromised by the assertion of federal power under the Necessary and Proper Clause." *Comstock*, 130 S. Ct. at 1967-68 (Kennedy, J., concurring in the judgment). When exercises of federal power "violate[] the principle of state sovereignty" they cannot be "*proper* for carrying into Execution" the Government's enumerated powers. *Printz*, 521 U.S. at 924. "Rather, they are, 'in the words of The Federalist, "merely acts of usurpation" which "deserve to be treated as such."'" *NFIB*, 132 S. Ct. at 2592 (Roberts, C.J.) (quoting *Printz*, 521 U.S. at 924).

These federalism principles dictate the outcome here. In criminalizing Bond's conduct, the United States "intrude[d] upon functions and duties traditionally committed to the State." *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring in the judgment). Indeed, this Court has found "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618; *NFIB*, 132 S. Ct. at 2578 (Roberts, C.J.); *Lopez*, 514 U.S. at 561 n.3; *Lopez*, 514 U.S. at 597 n.6 (Thomas, J.,

concurring); *Cohens v. Virginia*, 6 Wheat. 264, 426, 428 (1821). As applied here, the Act operates in the heartland of state sovereignty.

It is no answer to say that the government's prosecution does not stop Pennsylvania from bringing charges in its own right. BIO 20. "[T]he scope of the Necessary and Proper Clause is exceeded not only when the congressional action directly violates the sovereignty of the States," as in *Printz*, for example, "but also when it violates the background principle of enumerated (and hence limited) federal power." *NFIB*, 132 S. Ct. at 2646 (joint dissent). "State sovereignty is not just an end in itself." *Bond*, 131 S. Ct. at 2364 (quoting *New York v. United States*, 505 U.S. 144, 181 (1992)). Above all, our federal system exists to "secure[] the freedom of the individual," *id.*, and Bond cannot be punished under a law that unconstitutionally "change[s] ... the sensitive relation between federal and state criminal jurisdiction," *Lopez*, 514 U.S. at 561 n.3; *Bond*, 131 S. Ct. at 2367 (Ginsburg, J., concurring).

III. Only By Reversing The Judgment Below Can The Court Adhere To Precedent And Avoid Difficult Constitutional Questions Of Congressional Power.

A. The government's interpretation of the treaty power is incompatible with longstanding precedent.

The government claims that "well-settled precedent" holds that "federalism principles do not impose a limit on the subjects that can be addressed in a treaty or in

treaty-implementing legislation." BIO 23. That is untrue. Pet. Br. 26-27. For nearly two centuries, the Court has held that the treaty power is subject to "those restraints which are found in [the Constitution] against the action of the government ... and those arising from the nature of the government itself, and of that of the states." *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *Reid*, 354 U.S. at 16 (nothing in the Constitution "intimates that treaties and laws enacted pursuant to them do not have to comply with the provisions of the Constitution"); *Mayor of City of New Orleans v. United States*, 10 Pet. 662, 736 (1836) ("Congress cannot, by legislation, enlarge the federal jurisdiction, nor can it be enlarged under the treaty-making power."); *see also Downes v. Bidwell*, 182 U.S. 244, 370 (1901); *The Cherokee Tobacco*, 78 U.S. 616, 621-22 (1870); *Doe v. Braden*, 16 How. 635 (1835).

The Court has maintained that "[i]t would not be contended that [the power] extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states ...." *Geofroy*, 133 U.S. at 267. "[T]he framers of the Constitution intended that [the power] should extend to all those objects which in the intercourse of nations had usually been regarded as the proper subjects of negotiation and treaty" but only "if not inconsistent with the nature of our government and the relation between the States and the United States." *Holden v. Joy*, 84 U.S. 211, 243 (1872). Put simply, "it is well established that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Boos v. Barry*, 485 U.S. 312, 324 (1988).

Holland is not to the contrary. BIO 23-25. That case held that "[i]f the treaty is valid ... there can be no dispute about the validity of the statute under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." 252 U.S. at 432. That sentence is most sensibly read as rejecting what is now termed a facial challenge. Pet. Br. 29. Missouri sued to invalidate the Migratory Bird Treaty Act of 1918, which implemented a treaty between the United States and Great Britain. Pet. Br. 30 n.1. The Court interpreted Missouri's challenge as a "general one": if the treaty and statute were unlawful, it would be on the "general grounds" of interference with existing state law and the state's proprietary interest in wild fowl. *Holland*, 252 U.S. at 432, 434. In the Court's view, however, the treaty's object was of "national interest," and one that could "be protected only by national action in concert with that of another power." *Id.* at 435. In current vernacular, the treaty was facially valid because it had a "plainly legitimate sweep." *Wash. State Grange*, 552 U.S. at 449. And because (unlike in this case) Missouri did not challenge Congress's authority to implement the treaty under the Necessary and Proper Clause, the Court assumed the law's validity. *See United States v. Bond*, 681 F.3d 149, 156-57 (3d Cir. 2012) ("[T]he Court assumed without further discussion that, because the treaty was valid, so was the implementing statute.").

Moreover, the government is unwilling to embrace the full breadth of its *Holland* argument. Instead, it draws a jagged dividing line with "federalism principles" on one side and "the Constitution's express limitations on government power, such as those found in the Bill of Rights" on the other. BIO 23, 25. That is an unsustainable paradigm. In fact, the government's view seems to be of

recent vintage. Pet. Br. 36-37; *see also* 2 Op. Atty. Gen. 437 (1831) (concluding that the federal government is "under a constitutional obligation to respect [the powers reserved to the States] in the formation of treaties"); Department of State, Circular No. 175 (1955) ("Treaties are not to be used as a device for the purpose of effecting social changes or to try to circumvent the constitutional procedures established in relation to what are essentially matters of domestic concern.").

Far from reflecting "well-settled precedent," then, the government's disquieting vision of federal power breaks faith with "the compound republic of America." The Federalist No. 51, 387 (J. Madison). The suggested distinction between provisions granting powers and those reserving rights is illusory. The government's theory would mean that treaties enacted before December 15, 1791, superseded those rights later enshrined in the first eight amendments to the Constitution, a period dating back nearly a decade to the ratification of the Articles of Confederation on March 1, 1781. *See supra* at 8 n.2. But it was not the Bill of Rights that shielded these freedoms from federal encroachment. *NFIB*, 132 S. Ct. at 2577 (Roberts, C.J.); *see, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). "The enumeration of powers is also a limitation of powers, because [t]he enumeration presupposes something not enumerated." *NFIB*, 132 S. Ct. at 2577 (Roberts, C.J.). "[T]he Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights." The Federalist No. 84, 581 (A. Hamilton).

For this reason, the many powers not granted to the national government by the Constitution—and therefore reserved to the States under the Tenth Amendment—are

of equal stature to those in the Bill of Rights. Pet. Br. 34-36. The Court has made that important point clear *in this case*, *Bond*, 131 S. Ct. 2364, and in many others, *see, e.g.*, *Printz*, 521 U.S. at 935; *Morrison*, 529 U.S. at 616 n.7; *Lopez*, 514 U.S. at 567; *New York*, 505 U.S. at 177; *Comstock*, 130 S. Ct. at 1968 (Kennedy, J., concurring in the judgment); *NFIB*, 132 S. Ct. at 2576-78 (Roberts, C.J.); *id.* at 2676-77 (joint dissent). There is no reason to retreat because a treaty is involved. "[T]he Framers considered structural protections of freedom the most important ones, for which reason they alone were embodied in the original Constitution and not left to later amendment." *Id.* at 2676-77 (joint dissent).

B. Whether a treaty may intrude on powers reserved to the States cannot turn on whether it is self-executing or non-self-executing.

Although Congress's ability to implement a non-self-executing treaty is an issue warranting close attention, this case raises an important antecedent issue: "is there any initial power here at all?" *Reid*, 354 U.S. at 70 (Harlan, J., concurring in the result). By resolving the case on treaty power grounds, the Court can decide that issue and leave no doubt that Bond's conduct is beyond the authority of the United States to criminalize—period. By doing so, the Court will ensure that a decision focusing on the Act's validity is not seen as an endorsement of the mistaken idea that self-executing treaties somehow have greater substantive reach than do their non-self-executing counterparts.

There are notable procedural differences between these two instruments. Pet. Br. 31-33. Self-executing

treaties "automatically have effect as domestic law"; they are "equivalent to an act of the legislature" and each "operates of itself without the aid of any legislative provision." *Medellín*, 552 U.S. at 504-05. Non-self-executing treaties have no domestic effect until the full Congress "has ... enacted implementing statutes." *Id.* at 505. That said, the substantive scope of the treaty power cannot depend on the procedural channel used to invoke it. The Constitution's text contemplates no such distinction, and the Court, in turn, has found that the Constitution applies equally to treaties and implementing laws alike. *See Reid*, 354 U.S. at 16.

Establishing different regimes would give rise to troubling consequences. Federalism limits would apply when a treaty depends on legislation for domestic effect, as they should, but the President and Senate could evade those limits by making the treaty self-executing. Holding only treaty-implementing laws to constitutional limits would, perversely, allow the President and the Senate to accomplish objects the President, Senate, and House of Representatives together could not.

The President and Senate, for example, could abolish the death penalty, *but see Gregg v. Georgia*, 428 U.S. 153 (1976), commandeer state officials, *but see Printz*, 521 U.S. 898, or establish a national voting age for state and local elections, *but see Oregon v. Mitchell*, 400 U.S. 112 (1970). A Constitution that applies to laws implementing non-self-executing treaties but which leaves self-executing treaties unchecked would be little more than a "parchment barrier[]." The Federalist No. 48, 333 (J. Madison). The Court should deny this argument life by unequivocally holding that Bond's local conduct is beyond the substantive

reach of the treaty power no matter the Convention's path to implementation.

C. Overturning Bond's conviction as beyond the treaty power avoids hard constitutional questions.

To summarize, the Court should resolve this appeal by assuming (but not deciding) that the Convention and Act can cover any substantive power the Constitution vests in the President or Congress and holding that neither one—as applied to Bond—falls within the ambit of those powers. In so holding, the Court could establish that there is at least *some* substantive limitation on the treaty power, dispose of the government's claim that "Congress had independent authority under its commerce and necessary-and-proper clause powers to enact the Act," BIO 13, and avoid having to decide the issue taken for granted in *Holland*. By holding that criminalizing Bond's conduct is beyond the powers vested in the United States, the premise—*i.e.*, that Congress has plenary power under the Necessary and Proper Clause to carry a *valid* treaty into execution—will have been negated.

Conversely, the Court would need to decide a series of thorny constitutional issues to uphold Bond's conviction. First, the Court would need to decide whether a treaty can be predicated on an Article I power, an Article II power, or both, and which one of these powers allows the Convention to turn Bond's local crime into a federal offense. Second, the Court would need to decide if Congress has authority to implement this non-self-executing treaty. That question would require the Court in turn to decide whether Congress can anchor the Act in the Commerce

Clause or if the Necessary and Proper Clause provides it with authority to implement the treaty. These are all difficult constitutional questions that the Court should avoid deciding if possible. *See supra* at 11-14.

The Court can—and should—avoid those issues by overturning Bond's conviction as *ultra vires*. That result is faithful to precedent, avoids creating a schism between self-executing and non-self-executing treaties, and leaves for another day difficult questions of congressional power that need not be resolved here.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

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AMICUS CURIAE BRIEF

No. 12-158

IN THE

Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF FOR *AMICI CURIAE* PROFESSORS OF INTERNATIONAL LAW AND LEGAL HISTORY IN SUPPORT OF RESPONDENT

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Migratory Bird Conservation Act of 1913 (Weeks-McLean Law), Pub. L. No. 430, 37 Stat. 828, *repealed by* Migratory Bird Treaty Act of 1918, Pub. L. No. 186, 40 Stat. 755 ..... 26, 29

Migratory Bird Treaty Act of 1918, Pub. L. No. 186, 40 Stat. 755 (codified as amended at 16 U.S.C. §§ 703-712) 26, 28

Negro Seamen Act of 1822, Act of Dec. 21, 1822, ch. 3, § 3, 1822 S.C. Acts 11, 12 16

Treaties

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Convention Between the United States, Great Britain, Russia and Japan for the Preservation and Protection of Fur Seals (The Fur Seal Treaty of 1911), July 7, 1911, 37 Stat. 1542 23

Definitive Treaty of Peace and Friendship Between the United States of America and His Britannic Majesty (Treaty of Paris), Sept. 3, 1783, 80 Stat. 80 8

Treaty of Amity, Commerce, and Navigation (Jay Treaty), U.S.-Gr. Brit., Nov. 19, 1794, 8 Stat. 116 11

Treaty of Commerce and Navigation, U.S.-Japan, April 5, 1911, 37 Stat. 1504 29

Treaty with Great Britain Relating to Boundary Waters and Questions Arising along the Boundary Between the United States and Canada (Boundary Waters Treaty), January 11, 1909, 36 Stat. 2448 (1910) 23

Other Authorities

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Ambrose, Stephen E., *Eisenhower: The President* (1984) 32

Burr, Charles H., *The Treaty-Making Power of the United States and the Methods of Its Enforcement as Affecting the Police Powers of the States* (1912) 19, 25

Butler, Charles Henry, *The Treaty-Making Power of the United States* 22

Caroliniensis No. 7, Charleston Mercury, Aug. 28, 1823 17

Corwin, Edward S., *National Supremacy: Treaty Power vs. State Power* (1913) 19, 24, 25

Devlin, Robert T., *The Treaty Power Under the Constitution of the United States* (1908) 25

Flaherty, Martin S., *History Right? Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum. L. Rev. 2095 (1999) 3

Foreign Relations of the United States, 1952-1954 (William Z. Slany et al. eds., 1983) 33

Golove, David M., *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000) ..... *passim*

Hamilton, Alexander, *Remarks on the Treaty of Amity Commerce and Navigation Lately Made Between the United States and Great Britain* (July 9-11, 1795) 12

Hamilton, Alexander, *The Defence No. XXXVI* (Jan. 2, 1796) 13

Hamilton, Alexander, *The Defence No. XXXVII* (Jan. 6, 1796) 13

Hamilton, Alexander, *The Federalist No. 22* (Gary Wills ed., 1982) 3

Hearing, Treaties and Executive Agreements Before the Sen. Judiciary Comm. (1955) 34

Hollis, Duncan B., *Treaties in the Supreme Court, 1861 to 1900, in International Law in the U.S. Supreme Court: Continuity and Change* 55 (David L. Sloss et al. eds., 2011) 19

Holman, Frank E., *The Story of the "Bricker Amendment"* 38 (1954) 32

Kuhn, Arthur K., *The Treaty-Making Power and the Reserved Sovereignty of the States*, 7 Colum. L. Rev. 172 (1907) 25

Letter from President Eisenhower to William F. Knowland, Majority Leader (Jan. 25 1954), *in Foreign Policy*, Congressional Quarterly Almanac 10 (1954) 33

Lockwood, Jr., Bert B., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 Iowa L. Rev. 901 (1984) 31

Madison, James, *Vices of the Political System of the United States, April 1787* 3

Madison, James, *The Federalist No. 42* (Gary Wills ed., 1982) 4

Pendleton Mitchell, Nicholas, *State Interests in American Treaties* (1936) 19

Philonimus No. 7, Charleston Mercury, Sept. 13, 1823 17

Ramsey, Michael D., Missouri v. Holland *and Historical Textualism*, 70 Mo. L. Rev. 969 (2008) 7

Root, Elihu, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 Am. J. Int'l L. 273 (1907) 24

St. George Tucker, Henry, *Limitations on the Treaty-Making Power Under the Constitution of the United States* (1915) 25

Sloss, David, *International Agreements and the Political Safeguards of Federalism*, 55 Stan. L. Rev. 1963 (2003) 5

Tananbaum, Duane, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* (1988) 31, 33

The American Remembrancer; or an Impartial Collection of Essays, Resolves, Speeches &c., Relative or Having an Affinity to the Treaty with Great Britain 63 (Mathew Carey ed., 1795) 11, 12

The Argument of Benjamin Faneuil Hunt, in the Case of the Arrest of the Person Claiming to be a British Seaman, under the 3d Section of the State At of Dec. 1822, in Relation to Negroes, &c., before the Hon. Judge Johnson, Circuit Judge of the United States, for 6th Circuit (1823) *reprinted in* 2 *Free Blacks, Slaves, and Slaveowners in Civil and Criminal Courts* (Paul Finkelman ed., 1988) 16, 17

The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787 (Jonathan Elliot ed., 2d ed. 1996) (1836) 4, 5, 6

The Papers of Alexander Hamilton (Harold C. Syrett ed., 1973) 12

The Records of the Federal Convention of 1787 (Max Farrand ed., 1911) 3

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INTEREST OF THE AMICI CURIAE

Amici curiae are professors of international law and legal history interested in sharing their knowledge of the treaty power in American constitutional history with this Court.[1]

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[1] Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed letters of consent for amicus briefs with the Court.

SUMMARY OF ARGUMENT

The United States was able to become a global superpower because of the Framers' wise decision to allow the federal government to exercise national control in foreign affairs. Throughout our history, this power has been judiciously managed by our elected officials. As this brief shows, the Framers recognized and intended that treaties could operate in areas that would otherwise be left to the states, and treaties have impacted domains of state authority in various ways throughout U.S. history. Although Carol Bond's case could be decided on relatively narrow grounds, Petitioner and her *amici* invite this Court to overrule more than two centuries' worth of precedent and dramatically curtail the U.S. government's ability to credibly commit to and enforce international treaties. Instead, this Court should adhere to longstanding precedent and avoid crafting any new constitutional rules that might have unforeseen and harmful effects on foreign affairs and America's standing in the world.

ARGUMENT

I. The Framers Gave The Treaty Power To The Federal Government To Protect The Nation's Unity, Sovereignty, And Security In Foreign Affairs.

Under the Articles of Confederation, the federal government's inability to compel state compliance with treaty obligations vexed the young nation's ability to conduct foreign affairs and helped spur the calling of the Constitutional Convention in 1787. At that time, James Madison noted with concern that "not a year has passed without instances" of treaty

violations by "some one or other of the States." James Madison, *Vices of the Political System of the United States, April 1787, available at* http://founders.archives.gov/documents/Madison/01-09-02-0187; *see also* 1 *The Records of the Federal Convention of 1787*, at 164 (Max Farrand ed., 1911) (statement of James Madison) ("Experience had evinced a constant tendency in the States . . . to violate national Treaties."). As Alexander Hamilton explained, with "treaties of the United States . . . liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction," the "faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests" of each state, leaving the nation on so "precarious a foundation" that other nations could not trust or respect it. *The Federalist No. 22*, at 131 (Alexander Hamilton) (Gary Wills ed., 1982). *See generally* David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1100-48 (2000) (describing founding era discussion of treaty power) [hereinafter Golove, *Treaty-Making*]; Martin S. Flaherty, *History Right? Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land,"* 99 Colum. L. Rev. 2095, 2125 (1999).

The text of the new Constitution thus unambiguously delegated the full sovereign power to make treaties to the national government in Article II, U.S. Const. art II, § 2, cl. 2, while expressly denying states any power to make or to negate treaties. U.S. Const. art I, § 10, cl. 1 ("No state shall

enter into any Treaty, Alliance, or Confederation . . . ."); U.S. Const. art. VI, cl. 2 ("[A]ll Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see also The Federalist No. 42*, at 253 (James Madison) (Gary Wills ed., 1982) ("If we are to be one nation in any respect, it clearly ought to be in respect to other nations."). When the Framers split the atom of sovereignty, they awarded the full sovereign power to make treaties to the federal government and not the states, rendering the Tenth Amendment inapplicable by its own terms. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

That is not to say the treaty power is entirely unlimited. As this Court has long held, the Bill of Rights constrains the treaty power. *See Reid v. Covert*, 354 U.S. 1, 16-19 (1957). Similarly, a treaty could not be used to violate other prohibitory language in the Constitution, for example by purporting to appropriate funds from the federal treasury in contravention of the normal Article I requirements. *See* U.S. Const. art. I, § 9 ("No money shall be drawn from the treasury, but in consequence of appropriations made by law.").

Nor is the basic architecture of our federal system abandoned in the treaty context. First and foremost, the Framers chose to protect federalism by requiring the consent of two-thirds of the Senate. *See* 2 *The Debates in the Several State Conventions on the*

Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia, in 1787, at 507 (Jonathan Elliot ed., 2d ed. 1996) (1836) [hereinafter *Elliot's Debates*] (statements of James Wilson at Pennsylvania ratifying convention) ("[I]n the making of treaties, the states are mediately represented, and the people immediately represented; two of the constituent parts of government must concur in making them. Neither the president nor the Senate, solely, can complete a treaty; they are checks upon each other, and are so balanced, as to produce security to the people."). This was a considered choice, made in the context of concerns over potential treaties that threatened state interests of the most sensitive nature, but also in the face of consensus that subject matter limits on the treaty power were unwise. *See* Golove, *Treaty-Making*, *supra*, at 1133-49. Whatever skepticism might be warranted about the political safeguards of federalism in the statutory context, the Framers self-consciously chose to rely on an extraordinary supermajority requirement in the treaty context. This steep hurdle has significantly constrained the federal government from entering into treaties that would negatively affect the balance of our federal system. *See* David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 Stan. L. Rev. 1963, 1984-88 (2003).

Other constraints serve to protect federalism as well. Although Guarantee Clause claims have been found non-justiciable in other contexts, a treaty that denied states a republican form of government would likely be invalid under that clause. U.S. Const. art. IV, § 4. And while this Court has never directly

addressed the issue, it is possible that the anti-commandeering principle might come into play in an appropriate case. *See New York v. United States*, 505 U.S. 144 (1992).

It is equally clear, however, that the Framers did not curtail the treaty power in the particular ways that Petitioner and some of her *amici* suggest, namely by limiting the domestic effect of treaties to topics within Congress's other Article I powers or by carving off some vague substantive areas of regulation for exclusive state control. To the contrary, the Framers of the Constitution abandoned the confusing substantive caveats to the federal treaty power that existed under the Articles of Confederation, substituting a plenary delegation of authority to the President "to make Treaties" with the concurrence of the Senate. U.S. Const. art II, § 2, cl. 2. This textual conveyance of plenary national authority (accompanied by the explicit prohibition of such power to the states) is unambiguous and was not an accidental or unconsidered choice. *See* 3 *Elliot's Debates*, *supra*, at 363 (statement of Gov. Randolph at Virginia ratifying convention) ("The various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition. The government ought to have power to provide for every contingency."); *see also id.* at 509 (statement of George Mason at same) (noting with some concern that "[t]he President and Senate can make any treaty whatsoever" and proposing substantive limitations on the scope of the treaty power, which were not incorporated); Golove, *Treaty-Making*, *supra*, at 1089-1100, 1134 (noting that founding materials reveal the "shared supposition

that the [treaty] power was general and would extend as far as was customary under international practice"); Michael D. Ramsey, Missouri v. Holland *and Historical Textualism*, 70 Mo. L. Rev. 969, 1006 (2008) (concluding that Constitution's original meaning did not include subject matter limitations on treaty power).

II. From The Early Republic, Treaties Have Regulated Matters That Would Otherwise Be Within The Exclusive Legislative Power Of The States.

Extensive historical practice belies the argument that treaties cannot be implemented domestically unless they fall within one of Congress's other enumerated powers, or that there is some "invisible radiation" from the Tenth Amendment that categorically precludes federal enforcement of treaties addressing subjects within traditional state police powers. Petitioner and her *amici* suggest that modern treaties (especially international human rights treaties) intrude into state regulatory domains in a way that treaties in the past did not. But from the earliest days of the Nation, this Court and the lower courts have consistently enforced treaties in sensitive areas that otherwise would have fallen within the reserved powers of the states. This was so even during time periods when the federal government was otherwise understood to have very limited legislative authority over domains of traditional state police power. Indeed, objections to federal treaty authority grounded in states' rights quite similar to those in the present case arose at various points in the nation's history, but they were

soundly and repeatedly rejected in favor of a broad and flexible national power.

A. Treaties In The Founding Period And Beyond Routinely Preempted State Contract And Property Law.

1. The Treaty Of Peace Between The United States And Great Britain In 1783 Validly Preempted State Debt Confiscation Statutes That Otherwise Fell Within The Exclusive Legislative Competence Of The States.

One of the first serious foreign policy questions the United States encountered was the treatment of debts owed by Americans to British creditors. The 1783 peace treaty between the United States and Britain overruled state laws concerning property and contract by requiring the repayment of debts to British creditors notwithstanding state confiscation laws. Definitive Treaty of Peace, U.S.-Gr. Brit., art. IV, Sept. 3, 1783, 80 Stat. 80. In response, opponents of the treaty insisted that it unconstitutionally interfered with the states' internal police powers. *See* Golove, *Treaty-Making*, *supra*, at 1124-25. These arguments encouraged state noncompliance with the treaty, which, in turn, dramatically undermined the diplomatic position of the new nation and, as noted, helped provoke the adoption of a new Constitution that would remedy this defect.

When cases pursuant to the peace treaty came before the courts under the new Constitution, the treaty was consistently enforced over contrary state laws. In the seminal case *Ware v. Hylton*, 3 U.S. (3

Dall.) 199 (1796), for example, a British creditor sued American debtors to recover a debt incurred before the war. *Id.* at 199-201. The defendants argued that their debts had been discharged by a 1777 Virginia statute, but this Court held that the treaty preempted the otherwise valid state law. *Id.* at 237 (opinion of Chase, J.)

Significantly, the Court indicated that the state confiscation statute governed matters that would have been within the exclusive legislative competence of Virginia at the time it was enacted. For example, Justice Chase (in the first of the *seriatim* opinions expressing the Court's judgment) acknowledged that Virginia had authority to pass the confiscation statute in the first place, stating that "I am of opinion that the exclusive right of confiscating during the war, all and every species of British property, within the territorial limits of Virginia, resided only in the Legislature of that commonwealth." *Id.* at 222; *see also id.* at 266 (Iredell, J., dissenting on other grounds) (agreeing that prior to the treaty, the continental "Congress could have passed no act on this subject, but if it had wished for an act, must have recommended to the State Legislatures to pass it"). But the Court rejected the argument that the federal Congress lacked the "power to make a treaty, that could operate to annul a legislative act of any of the states, and to destroy rights acquired by, or vested in individuals, in virtue of such acts." *Id.* at 235 (opinion of Chase, J.). Whatever doubts might have existed under the Articles of Confederation, the new Constitution made clear that "[i]t is the declared will of the people of the United States that every treaty made, by the authority of the United States,

shall be superior to the Constitution and laws of any individual State; and their will alone is to decide." *Id.* at 237.

The opinions rejected as contrary to the constitutional scheme the contention that state legislatures alone could remedy any inconsistency between the treaty and state law, for "[i]f a law of a State, contrary to a treaty, is not void, but voidable only by a repeal, or nullification by a State Legislature, this certain consequence follows, that the will of a small part of the United States may controul or defeat the will of the whole." *Id.*; *id.* at 281 (opinion of Wilson, J.) ("The treaty is sufficient to remove every impediment founded on the law of Virginia."); *id.* at 284 (opinion of Cushing, J.) (similar).

Even before *Ware*, lower courts under the authority of the Supremacy Clause had been enforcing the peace treaty obligations. *See, e.g.*, *Hamilton v. Eaton*, 11 F. Cas. 336, 338, 340 (C.C.D. N.C. 1792) (enforcing treaty obligation to repay debts despite North Carolina state law). Later cases continued to enforce the treaty over inconsistent state laws. *See, e.g.*, *Higginson v. Mein*, 8 U.S. (4 Cranch) 415, 419 (1808) ("If, then, [Georgia's] act of confiscation, independent of the treaty, would be construed to destroy the claim of the mortgagee, the treaty reinstates the lien in its full force . . . ."); *Hopkirk v. Bell*, 7 U.S. (3 Cranch) 454, 458 (1806) (denying enforcement of Virginia statute of limitations because it was inconsistent with treaty).

2. Treaties Governing Land Ownership Were Adopted And Enforced Over States' Rights Objections From The Founding Era Forward.

Another major area of controversy in the early Republic (and in later years) concerned ownership of real property, something ordinarily at the core of states' police powers. *See* Golove, *supra*, at 1106-15. In 1794, simmering tensions between Great Britain and the United States led President Washington, in the hopes of avoiding a war, to dispatch Chief Justice Jay to negotiate a new treaty. The terms of the resulting treaty provoked extensive controversy.

One focus of initial debate was a provision providing British subjects with the right to sell, devise, and inherit real property. *See* Treaty of Amity, Commerce, and Navigation (Jay Treaty), U.S.-Gr. Brit., art. 9, Nov. 19, 1794, 8 Stat. 116. Opponents of the Jay Treaty argued that this provision would result in massive redistribution of land to British owners, would interfere with states' rights to govern real property within their territories, and would therefore exceed the treaty power. *See* Golove, *Treaty-Making*, *supra*, at 1157-78; *id.* at 1158 (quoting Virginia Senator Henry Tazewell's argument against ratification on the grounds that "the rights of the individual States are by the 9th article of the treaty, unconstitutionally invaded"); Cato [Robert Livingston], *Observations on Mr. Jay's Treaty, No. XVI, reprinted in* 3 *The American Remembrancer; or an Impartial Collection of Essays, Resolves, Speeches &c., Relative or Having an Affinity to the Treaty with Great Britain* 63 (Mathew Carey ed., 1795) (arguing that Article 9 "appears to

infringe the constitutional independence of the respective states" because "[t]his is an act of sovereignty which is confined to the state legislatures, and which they have not ceded to congress, about which, therefore, I am led to doubt the right of the president and senate to treat"); Decius [Brockholst Livingston], *Reflections on Mr. Jay's Treaty, No. II, reprinted in* 2 *The American Remembrancer* 125 (arguing that Article 9 "infringes the rights of the different States").

These states' rights objections were decisively rejected in both the political and judicial realms. In response to George Washington's request for analysis of the Jay Treaty, Alexander Hamilton refuted the states' rights objections, noting that restricting treaties on the grounds that they invaded the legislative domain of the states "would totally subvert the power of making Treaties" for "[t]here can hardly be made a Treaty which does not make some alteration in the existing laws and which does not, as to its objects, controul the legislative authority – and from the nature of our constitution this must apply to the State laws and legislatures as well as to those of the Union." Golove, *Treaty-Making*, *supra*, at 1160 (quoting Alexander Hamilton, *Remarks on the Treaty of Amity Commerce and Navigation Lately Made Between the United States and Great Britain* (July 9-11, 1795), *in* 18 *The Papers of Alexander Hamilton* 428 (Harold C. Syrett ed., 1973)) [hereinafter *Hamilton Papers*]. Later, in published essays defending the Jay Treaty, Hamilton asserted that "[i]t was impossible for words more comprehensive to be used than those which grant the power to make treaties . . . . [W]hatever is a proper subject of

compact between Nation & Nation may be embraced by a Treaty." Alexander Hamilton, *The Defence No. XXXVI* (Jan. 2, 1796), *reprinted in* 20 *Hamilton Papers*, at 6. The language of the Supremacy Clause, Hamilton explained, laid to rest any "room for question whether a Treaty of the Union could embrace objects the internal regulation of which belonged to the separate authorities of the States." Hamilton, *The Defence No. XXXVII* (Jan. 6, 1796), *reprinted in* 20 *Hamilton Papers*, at 16.

These views carried the day, reflecting the considered view of the Founding generation on the scope of the Treaty Clause. The Senate provided its consent to the Jay Treaty; Washington ratified it; when the House adopted implementing legislation, the floor debates contained no mention of any lingering constitutional objections to Article 9 on states' rights grounds (though opponents voiced other strenuous policy objections). *See* Golove, *Treaty-Making*, *supra*, at 1176.

Thereafter, this Court – which was fully aware of the preceding debates and some members of which had previously opposed the Jay Treaty – consistently upheld the controversial provisions permitting alien land ownership. The issue most prominently came to this Court in *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. (7 Cranch) 603 (1812), which concerned Lord Fairfax's vast properties in Virginia. *Id.* at 604. While Lord Fairfax had taken Virginia citizenship and retained it after the Revolution, when he died in 1781 his heir, Denny Fairfax, was a British subject. *Id.* at 607. This led to years of controversy, state legislation purporting to reallocate the lands, the sale of some of the property to (oddly enough) Chief

Justice John Marshall, and protracted litigation. The parties' arguments implicated both Article 9 of the Jay Treaty and Article VI of the earlier 1783 peace treaty, which had provided that "there shall be no future Confiscations made" of British subjects' property.

In the Virginia Court of Appeals, Judge Spencer Roane advanced the states' rights position, holding that Article VI of the Treaty of Peace should be read narrowly so as not to affect the ordinary common law rules against devising property to aliens. To read it otherwise, he reasoned, would "invade a right of the several states, entirely of an internal and municipal nature" and that was "emphatically, beyond the power of congress" at least under the Articles of Confederation. *Hunter v. Fairfax's Devisee*, 15 Va. 218 (1810), app. at 620. At most, Judge Roane asserted, these types of treaty provisions constituted a recommendation that state legislatures change their laws. *Id.* Roane thought the Jay Treaty inapplicable because it had not yet been ratified when the case began, and he suggested that its terms had no bearing on the proper interpretation of the 1783 treaty because the federal government had broader powers under the new Constitution. *Id.* at 611, 625. In other words, even a judge working hard to assert a states' rights position in the case recognized the breadth of the federal government's powers under the Constitution. *See also* Golove, *Treaty-Making*, *supra*, at 1199.

This Court reversed in an opinion by Justice Story. *Fairfax's Devisee*, 11 U.S. (7 Cranch) at 628. The Court held that Article 9 of the Jay Treaty "completely protects and confirms the title of Denny

Fairfax." *Id.* at 627. On remand, the Virginia Court of Appeals defiantly refused to enforce the judgment and held that this Court had lacked appellate jurisdiction over its decisions. This Court reversed yet again in its landmark decision of *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 323, 362 (1816).

Subsequent decisions of this Court continued to enforce treaty provisions governing alien land ownership, negating any possible states' rights limitation on the treaty power based on categories that would ordinarily fall within the states' police powers and outside federal legislative power. *See, e.g., Soc'y for the Propagation of the Gospel v. New Haven*, 21 U.S. (8 Wheat.) 464, 490-92 (1823) (applying treaty to protect property of a British corporation from escheat for alienage under state law); *Orr v. Hodgson*, 17 U.S. (4 Wheat.) 453, 462-65 (1819) (applying Article VI of the Treaty of Peace and Article 9 of Jay Treaty instead of state law on escheat of estates); *Craig v. Radford*, 16 U.S. (3 Wheat.) 594, 599-600 (1818) (reaffirming supremacy of Article 9 of Jay Treaty); *Chirac v. Lessee of Chirac*, 15 U.S. (2 Wheat.) 259, 270, 277-78 (1817) (finding it "unnecessary to inquire into the consequences" of a Maryland alien land ownership law because a treaty with France enabled the subjects of France to hold lands in the United States).

B. States' Rights Limitations On The Scope Of The Treaty Power Were Asserted In Connection With Defending Slavery, But Were Decisively Rejected By The Nation.

The argument that states' rights limited the substantive scope of the treaty power was revived in connection with the defense of slavery in the antebellum period, but was ultimately rejected as decisively as it had been in the early Republic. One flashpoint concerned the presence of free persons of African descent in the Southern states. In 1822, South Carolina passed the Negro Seamen Act, which provided for the jailing of black sailors when their ships docked in South Carolina ports and their sale as slaves if the captain of the ship failed to ransom them out by paying the expenses of their detention. *See* Golove, *Treaty-Making*, *supra*, at 1211-38. When this provision was applied to black sailors on British ships, the British government objected that this violated the terms of the Commercial Convention of 1815.

In a habeas case involving a detained black British sailor, the defenders of the South Carolina law asserted that the state had retained the sovereign right to protect its vital interests and that "the treaty making power can make no stipulation which shall impair the rights, which by the constitution are reserved 'to the States respectively, or to the people.'" Benjamin Faneuil Hunt, *The Argument of Benjamin Faneuil Hunt, in the Case of the Arrest of the Person Claiming to be a British Seaman, under the 3d Section of the State Act of Dec. 1822, in Relation to Negroes, &c., before the Hon. Judge Johnson, Circuit Judge of the United States,*

for 6th Circuit 1, 4 (1823), *reprinted in* 2 *Free Blacks, Slaves, and Slaveowners in Civil and Criminal Courts* at 1-22 (Paul Finkelman ed., 1988). Riding circuit, Supreme Court Justice William Johnson – a native South Carolinian and noted Jeffersonian – rejected this argument. Such a crabbed interpretation of the treaty power would render the Union, "like the old confederation . . . a mere rope of sand." *Elkison v. Deliesseline*, 8 F. Cas. 493, 496 (C.C.D. S.C. 1823). Outraged defenders of South Carolina's laws launched a campaign of criticism against the decision. In a series of essays, they argued that treaties could not interfere "with the numerous undefined powers reserved to the states" and that a treaty "is no more than an act of congress" and cannot "interfere . . . with the powers . . . reserved to the states respectively." *Caroliniensis No. 7, Charleston Mercury*, Aug. 28, 1823. Justice Johnson responded in his own series of essays defending the supremacy of the federal treaty power. Among other things, he noted, if the treaty power were limited in the way South Carolina suggested "we have been strangely inattentive to our rights for half a century past. For upon a cursory examination of treaties, I find no less than thirty-six instances in which the rights of the States have been invaded" and in which "treaties have acted upon subjects within the acknowledged reservation of the states." *Philonimus No. 7, Charleston Mercury*, Sept. 13, 1823.

Although the issue never directly reached the Supreme Court, it festered as a thorn in American-British relations because Southern states insisted that they would resist federal encroachment on what

they perceived as the most crucial domain of state police powers. In the continuing debate, future Chief Justice Roger Taney, then Attorney-General, would offer his own opinion in favor of the states' rights view on the relationship between the treaty power and the Negro Seaman Acts, but even he acknowledged that the Supreme Court was not likely to agree. *See* Golove, *Treaty-Making*, *supra*, at 1226-29.[2] Taney's arguments were intimately related to a broader conception of states' rights and "strict construction" that sought to carve out of the federal government's otherwise delegated powers an exclusive domain of state authority over issues such as slavery. Ultimately, the Nation repudiated this antebellum edifice of states' rights in the crucible of the Civil War. *See id.*

C. Throughout The Nineteenth Century, Treaties Regulated A Wide Variety Of Subjects Within The Police Powers Of The States.

While a few topics, like the Negro Seaman Acts, sparked controversy, throughout the nineteenth century, the federal government continued with little fanfare to enter into numerous treaties that touched on areas that would otherwise fall within states' traditional police powers. *See, e.g.*, Nicholas

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[2] When he was Attorney General, Caleb Cushing issued an elaborate opinion defending national treaty power against antebellum states' rights objections. *See* 8 Op. Att'y Gen. 417 (1857) (cited in *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1880) and *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890)).

Pendleton Mitchell, *State Interests in American Treaties* 157-204 (1936) (listing treaties governing various topics affecting state powers). Dozens of treaties provided, *inter alia*, that aliens and their property should be protected under local law, *id.* at 159-60; for the right of aliens to dispose of their property, *id.* at 163-66; that aliens should have access to court, *id.* at 160-61; for the religious freedom of aliens, *id.* at 162; for consular powers, privileges and immunities, *id.* at 173-82; and extradition, *id.* at 185-202. *See also* Edward S. Corwin, *National Supremacy: Treaty Power vs. State Power* 134-36 (1913) (describing broad array of treaties in nineteenth century).

During this period, this Court applied treaties frequently and did not, in any instance, refuse to enforce a treaty on federalism grounds. *See* Duncan B. Hollis, *Treaties in the Supreme Court, 1861 to 1900, in International Law in the U.S. Supreme Court: Continuity and Change* 55, 55 (David L. Sloss et al. eds., 2011) [hereinafter *International Law in the U.S. Supreme Court*]; Charles H. Burr, *The Treaty-Making Power of the United States and the Methods of Its Enforcement as Affecting the Police Powers of the States*, 51 Proc. Am. Phil. Soc'y 270, 356 (1912) (discussing cases up to approximately 1909, and asserting "[s]uch is the unbroken series of cases decided by the Supreme Court of the United States, recognizing, stating, and enforcing the absolute supremacy of treaty provisions over State laws. No case has ever in the history of the United States been decided, which holds, for any reason or under any conditions a treaty provision to be subordinate to a State law or State right"). Indeed,

when the Court declared the 1870 Trademark Act beyond Congress's Article I commerce and intellectual property protection powers, it noted that it was "leaving untouched the whole question of the treaty-making power over trade-marks, and of the duty of Congress to pass any laws necessary to carry treaties into effect." *In re Trade-mark Cases*, 100 U.S. 82, 99 (1879).

In *Geofroy v. Riggs*, 133 U.S. 258 (1890), this Court upheld yet another treaty provision that, notwithstanding state laws, granted aliens the right to inherit real property. *Id.* at 267. The Court explained "[t]hat the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear." *Id.* at 266. Indeed, citing *Ware v. Hylton* and other cases from the early Republic, the Court went on to say,

> [t]he treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter, without its consent. . . . But, with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any

> matter which is properly the subject of negotiation with a foreign country.

Id. at 267; *see also, e.g.*, *Burthe v. Denis*, 133 U.S. 514, 520-21 (1890) (finding that Louisiana state distribution laws must give way to a treaty requiring payment of an award to a French national); *Hauenstein v. Lynham*, 100 U.S. 483, 490 (1879) (enforcing treaty governing property of alien who died intestate and noting that it "is a fundamental principle in our system of complex national polity" that "the Constitution, laws, and treaties of the United States are as much a part of the law of every State as its own local laws and Constitution"); *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 756, 758, 760 (1866) (finding that state law purporting to tax lands held by three tribes could not be enforced since it was in conflict with treaties); *In re Ah Chong*, 2 F. 733, 737-38 (C.C.D. Cal. 1880) (striking down a state law that prohibited aliens from fishing in state waters, in part, because the law violated a treaty); *In re Tiburcio Parrott*, 1 F. 481, 494, 499 (C.C.D. Cal. 1880) (Hoffman, J.) (invalidating state law prohibiting employment of Chinese residents by California corporations and holding that "even if the reserved power of the state over corporations were as extensive as is claimed, its exercise in the manner attempted in this case would be invalid, because in conflict with the treaty"); *Baker v. City of Portland*, 2 F. Cas. 472, 473-74 (C.C.D. Or. 1879) (striking down an Oregon law prohibiting the employment of Chinese persons on public works projects as contrary to a treaty); *In re Ah Fong*, 1 F. Cas. 213, 216-18 (C.C.D. Cal. 1874) (invalidating on treaty and other

grounds a California law excluding "lewd" Chinese women).

Moreover, state courts operating under the obligations of the Supremacy Clause also enforced treaty obligations over inconsistent state laws. For example, the Louisiana Supreme Court held that a Louisiana tax on foreign heirs could not be applied where contrary to the terms of the 1853 France-U.S. consular convention. *See Succession of Louis Dufour*, 10 La. Ann. 391, 392-93 (1855) ("[The] said provision [of the treaty] being constitutionally valid must be [obeyed] as supreme law; [and] consequently the statute of Louisiana has become *pro tanto* inoperative."); *see also People v. Gerke*, 5 Cal. 381, 385 (1855) (enforcing treaty governing alien land ownership); *Forbes v. Scannell*, 13 Cal. 242, 283 (1859) (reaffirming *Gerke*).

The Executive Branch generally endorsed the same view. In 1898, for example, Attorney General John Griggs concluded that the federal government had the power to make a treaty regarding fisheries along the Canadian border notwithstanding the fact that "regulation of fisheries in navigable waters within the territorial limits of the several States, in the absence of a Federal treaty, is a subject of State rather than of Federal jurisdiction." 22 Op. Att'y Gen. 214 (1898); *cf. McCready v. Virginia*, 94 U.S. 391, 395 (1876) (finding fisheries "under the exclusive control of the State," in a case not involving a treaty). *See also* Golove, *Treaty-Making*, *supra*, at 1241-42 (discussing executive views); Charles Henry Butler, *The Treaty-Making Power of the United States* i-ii (2 vols. 1902) (endorsing broad federal treaty power).

D. In The Twentieth Century, This Court Reconfirmed The Broad Scope Of The Treaty Power And The Supremacy Of Treaties Over State Law.

1. In The First Decades Of The Twentieth Century, This Court Continued To Apply A Broad Conception Of The Treaty Power.

This Court's early twentieth century jurisprudence was notable for its stringent limitations of federal power, but the Court continued to uphold treaties even as the range of topics they covered expanded to include more areas that would otherwise fall within the states' control. Treaties in this time period frequently addressed not only international issues affecting individuals such as immigration, citizenship, and extradition, but also more typically domestic subjects including wildlife preservation,[3] water quality,[4] and drug control.[5] *See* Michael P. Van Alstine, *Treaties in the Supreme*

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[3] *See, e.g.*, Convention between the United States and Other Powers Providing for the Preservation and Protection of Fur Seals, July 7, 1911, 37 Stat. 1542, (providing for protection of wildlife).

[4] Boundary Waters Treaty, Jan. 11, 1909, 36 Stat. 2448, (establishing an international commission to oversee issues related to waters on the boundary between the United States and Canada including water pollution).

[5] International Opium Convention, Jan. 23, 1912, 38 Stat. 1912 (requiring nations to control opium).

Court, 1901 to 1945, in International Law in the U.S. Supreme Court, supra, at 191, 192.

The Court applied treaties in more than two hundred cases in the first part of the century. *See id.* at 193. For example, in *Neely v. Henkel*, 180 U.S. 109 (1901), the Court upheld an order of extradition to Cuba, and using language presaging the more famous opinion in *Missouri v. Holland*, noted that as long as a treaty is valid, Congress has the power to "make all laws necessary and proper for carrying into execution . . . such legislation as is appropriate to give efficacy" to the treaty. *Id.* at 121.

Shortly after the turn of the century, controversy arose when San Francisco tried to segregate Asian children into separate schools, prompting an objection from Japan based on the 1894 Treaty of Commerce and Navigation. *See* Golove, *Treaty-Making, supra*, at 1249-50. Facing federal pressure, the city backed down and rescinded the policy before the matter could be resolved in the courts. However, in response to this controversy, influential commentators reaffirmed the broad scope of the treaty power, responding to a minority of voices seeking to revive the states' rights arguments that had been rejected in earlier periods. *See, e.g.*, Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution,* 1 Am. J. Int'l L. 273, 278 (1907) ("It has been widely asserted or assumed that this treaty provision and its enforcement involved some question of state's rights. There was and is no question of state's rights involved, unless it be the question which was settled by adoption of the constitution."); Edward S. Corwin, *National Supremacy, supra*, at 296-308 (supporting

broad federal treaty power); Robert T. Devlin, *The Treaty Power Under the Constitution of the United States* 128-32 (1908) (same); Charles H. Burr, *The Treaty-Making Power of the United States*, *supra*, at 397-98 (1912) (same); Arthur K. Kuhn, *The Treaty-Making Power and the Reserved Sovereignty of the States*, 7 Colum. L. Rev. 172, 185 (1907) (same). *But see, e.g.*, Henry St. George Tucker, *Limitations on the Treaty-Making Power Under the Constitution of the United States* 392-95 (1915) (arguing that power to exclude children from public schools on basis of race falls within states' reserved powers and that federal government lacked power to compel admission of children to public schools on basis of treaty).

2. *Missouri v. Holland* Was Supported By Precedent When It Was Decided And Has Been Consistently Followed In The Ensuing Nine Decades.

This Court's 7-2 decision in *Missouri v. Holland*, 252 U.S. 416 (1920), thus was not a novel or ill-considered decision but was entirely consistent with long-standing interpretation of the treaty power, affirmed in the face of repeated challenges. While displaying Justice Holmes' characteristic conciseness, the opinion drew upon the long line of precedents already discussed as well as the writings of leading commentators, especially Edward Corwin's then-recent historical treatise on the issue. *See* Golove, *Treaty-Making*, *supra*, at 1257-58.

The treaty at issue in *Missouri* addressed the impending extinction of migratory birds in North America due to overhunting and, in doing so, entered into an area that had been held to fall within the

states' police powers. *See Geer v. Connecticut*, 161 U.S. 519, 523, 529, 534-35 (1896) (finding control of wild game to fall within state police power). Congress had tried to protect migratory birds by statute in 1913, but the lower courts had found that legislation unconstitutional. *See United States v. McCullagh*, 221 F. 288, 294-96 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154, 159-60 (E.D. Ark. 1914).

At the same time, however, concern about the issue led to calls for the negotiation of a treaty on the topic, which President Wilson quickly pursued. The resulting treaty on migratory birds with Great Britain (on behalf of Canada) was ratified in 1916 and was followed by passage of the Migratory Bird Treaty Act of 1918, which this Court considered and upheld in *Missouri*. Even before it reached this Court, the outcome of this litigation seemed assured; all four lower courts considering challenges to the 1918 legislation upheld its validity. *See United States v. Rockefeller*, 260 F. 346, 348 (D. Mont. 1919); *United States v. Selkirk*, 258 F. 775, 776 (S.D. Tex. 1919); *United States v. Samples*, 258 F. 479, 484-85 (W.D. Mo. 1919), *aff'd sub nom. Missouri v. Holland*, 252 U.S. 416 (1920); *United States v. Thompson*, 258 F. 257, 268 (E.D. Ark. 1919).

Like Petitioner in this case, the State of Missouri argued strenuously that the statute intruded upon traditional state police powers. Brief for Petitioner, *Missouri v. Holland*, 252 U.S. 416 (1920). Missouri's argument was that under the Tenth Amendment "what an act of Congress could not do unaided, in derogation of the powers reserved to the States, a treaty cannot do." *Missouri*, 252 U.S. at 432. But, as

the Court pointed out, this claim ignored the fact that the treaty power is an independent grant of power to the federal government. *See id.* ("To answer this question it is not enough to refer to the Tenth Amendment, reserving the powers not delegated to the United States, because by Article II, § 2, the power to make treaties is delegated expressly."). As a result, the question reduced to "whether [the treaty] is forbidden by some invisible radiation from the general terms of the Tenth Amendment." *Id.* at 434. In finding that there was no such invisible radiation, the Court concluded that there is no realm in which the states are guaranteed exclusive regulatory powers notwithstanding the federal government's delegated authorities. The fact that "but for the treaty the State would be free to regulate this subject itself" was irrelevant since "most of the laws of the United States . . . deal with matters which in the silence of such laws the state might regulate." *Id.* at 434. Furthermore, the Court reasoned, the Constitution altogether forbids the states to conclude treaties, leaving them "incompetent to act." *Id.* at 433. Thus, denying the federal government the power to conclude treaties on subjects beyond Congress' enumerated authorities, but in which there may be "a national interest of very nearly the first magnitude," would leave the nation without "a power which must belong to and somewhere reside in every civilized government." *Id.* at 433-35 (quoting *Andrews v. Andrews*, 188 U.S. 14, 33 (1903), *abrogated on other grounds by Sherrer v. Sherrer*, 334 U.S. 343, 353 (1948)). Relying upon many of the precedents already discussed, the Court therefore rejected Missouri's argument and upheld the law.

Some of the *amici* in the instant case suggest that allegedly unforeseen developments in modern treaty practice – in particular, the development of human rights treaties – warrant revisiting the holding of *Missouri*. But, to the contrary, history shows that the *Missouri* Court was well aware of the ramifications of its decision for the nascent field of human rights treaties. The Court nevertheless endorsed Justice Holmes' opinion because it was consistent with constitutional text, structure, original meaning, and precedent. While human rights treaties have become more common over the later part of the twentieth century, they were not unknown or unforeseen in the 1920s. At the very moment *Missouri* was decided, the Senate was considering the Treaty of Versailles, which created the International Labor Organization. This provoked extensive public discussion of potential labor treaties governing matters such as child labor and wage and hour regulations. *See* Golove, *Treaty-Making*, *supra*, at 1267-68. Indeed, one of the briefs in *Missouri* argued that upholding the Migratory Bird Treaty Act would mean that, if the United States became party to the Versailles Treaty, Congress would thereby be empowered "with constitutional authority to control the employment of labor in local industries, within each of the sovereign states, to determine the conditions of labor, to prescribe a minimum wage, to regulate hours of labor, to prohibit child labor, and to determine the innumerable questions of a similar character which have always been supposed to be a

matter of state regulation." Brief for the State of Kansas, Amicus Curiae, at 28-29, 43, *Missouri v. Holland*, 252 U.S. 416 (1920). Under *Hammer v. Dagenhart*, 247 U.S. 251 (1918),[6] decided only two years before *Missouri*, child labor laws were as outside federal legislative power as the 1913 Migratory Bird Act had been; but the *Missouri* Court did not blanche at the prospect that a labor treaty could change that.

The holding of *Missouri* was consistently affirmed in subsequent rulings during this period. In *Asakura v. City of Seattle*, 265 U.S. 332 (1924), this Court ruled that the Treaty of Commerce and Navigation of April 5, 1911 with Japan trumped an inconsistent municipal ordinance regulating pawnbrokers. *Id.* at 343. As the Court explained, "[t]he treaty-making power of the United States is not limited by any express provision of the Constitution," but rather, "extend[s] to all proper subjects of negotiation between our government and other nations." *Id.* at 341. Moreover, "[t]he rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws." *Id.*; *see also Nielsen v. Johnson*, 279 U.S. 47, 52 (1929) (upholding treaty over state inheritance tax law and noting that "as the treaty-making power is

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[6] A few decades later, of course, this Court would overrule *Hammer* in *United States v. Darby*, 312 U.S. 110, 116-17 (1941), having learned, from decades under an incoherent Commerce Clause jurisprudence, "the imprecision of content-based boundaries used without more to define the limits of" federal power. *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring).

independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments"); *Santovincenzo v. Egan*, 284 U.S. 30, 40 (1931) (upholding treaty governing disposition of intestate aliens' property at death over a New York statute, noting that "[t]he treatymaking power is broad enough to cover all subjects that properly pertain to our foreign relations").

In short, far from being an ill-considered novelty, *Missouri* was strongly supported by precedent and has been followed in the ninety years since it was decided.

III. Attempts To Amend The Constitution To Narrow The Treaty Power Were Rejected In The 1950s.

Even assuming *arguendo* that conditions of the world have changed so dramatically since the Founding Period that constriction of the treaty power could be considered appropriate, as Petitioner's *amici* argue, there is a mechanism for doing that: constitutional amendment. Indeed, opponents of human rights treaties in the 1950s attempted precisely this path with a series of proposed amendments to the Constitution known as the Bricker Amendments. But these constitutional amendments were soundly rejected after extensive debate, and this Court should not now accept the invitation of petitioner and *amici* to overstep the separation of powers and amend the Constitution by judicial fiat.

A. Supporters Of The Bricker Amendments In The 1950s Tried Unsuccessfully To Constrict The Treaty Power.

In the 1950s, defenders of racial segregation were concerned about the potential for treaties to be a tool against racial discrimination. The U.N. Charter referred to protection of human rights as one of the goals of the post-war world order, and the Universal Declaration of Human Rights received the support of the Truman administration and the U.N. General Assembly in 1948. While the Universal Declaration itself was nonbinding, work soon began on drafting the two foundational human rights treaties that would ultimately be known as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Creative litigants had already tried to use the references to human rights in the U.N. Charter in dozens of cases to attack racially discriminatory laws. *See* Bert B. Lockwood, Jr., *The United Nations Charter and United States Civil Rights Litigation: 1946-1955*, 69 Iowa L. Rev. 901, 917-48 (1984). The isolationist President of the American Bar Association, Frank Holman, warned that a white motorist who struck and killed a black child could be hauled off to face international trial under the Genocide Convention. Duane Tananbaum, *The Bricker Amendment Controversy: A Test of Eisenhower's Political Leadership* 13 (1988).

Stoking fears generated by these developments, Senator John Bricker introduced a series of proposed constitutional amendments that would have limited the treaty power. Several versions of the amendment were proposed over a span of a few years. Many

included language – which critics said was circular – to the effect that treaties conflicting with the Constitution would have no effect. *See* Stephen E. Ambrose, *Eisenhower: The President* 68 (1984) (quoting President Eisenhower as having disparaged the amendment as "an addition to the Constitution that said you could not violate the Constitution"). But more far-reaching versions included language known as the "which" clause, which would have overruled *Missouri* by providing that a treaty "shall become effective as internal law in the United States only through legislation which would be valid in the absence of treaty [*sic*]." Tananbaum, *The Bricker Amendment Controversy*, *supra*, at 91-92.

In terms echoing some of the *amici* in this case, Bricker and his supporters argued amendment of the Constitution was necessary because otherwise international human rights treaties would be used to "control and regulate all education, including public and parochial schools, it could control and regulate all matters affecting civil rights, marriage, divorce, etc; it could control all our sources of production of foods and the products of the farms and factories; . . . it could regiment labor and conditions of employment." Frank E. Holman, *The Story of the "Bricker Amendment"* 38 (1954). Moreover, Bricker claimed, international treaties were "an attempt to repeal the Bill of Rights," a threat to freedom of religion, and "a blueprint for tyranny." 82 Cong. Rec. 97, 8255 (1951).

B. The Bricker Amendments Were Rejected Because It Would Have Crippled The Nation's Ability To Conduct Foreign Policy.

The Eisenhower administration led the opposition to the Bricker Amendments. President Eisenhower recognized that the Bricker Amendments – like the rule advocated by Petitioner and her *amici* in the instant case – would force the "Administration to represent 49 governments in its dealings with foreign powers, whereas he was convinced that in foreign affairs there could be only one United States." Memorandum by the Assistant White House Staff Secretary (Minnich) (Jan. 11, 1954), *in* 1 *Foreign Relations of the United States, 1952-1954*, at 1832 (William Z. Slany et al. eds., 1983); Letter from President Eisenhower to William F. Knowland, Majority Leader (Jan. 25 1954), *in Foreign Policy*, Congressional Quarterly Almanac 10 (1954) (stating proposed amendment would "shackle the federal government so that it is no longer sovereign in foreign affairs," and that it would show "to our friends as well as our enemies abroad that our country intends to withdraw from its leadership in world affairs"). The administration feared a return to the problems of the Articles of Confederation, "when American Ambassadors were subject to ridicule abroad because [they] represented thirteen states, not one central government." Tananbaum, *The Bricker Amendment Controversy*, *supra,* at 138.

As an illustration of the difficulties that would be posed by the amendment, the State Department submitted to Congress a list of eighty-four treaties negotiated between 1920 and 1955 that would not have been enforceable if the "which" clause were

adopted because they addressed "subject matter not within the delegated powers of the Congress and which in the absence of treaty is reserved to the jurisdiction of the States." *Hearing, Treaties and Executive Agreements Before the Sen. Judiciary Comm.*, 986-92 (1955). In the end, opposition was so strong that the version of the amendment that finally came to a vote in the Senate omitted the "which" clause. Tananbaum, *supra*, at 139-43, 148, 153. Even the weaker versions of the amendment were rejected, however, and the only version that came close to passage in even one house of Congress concerned executive agreements (concluded solely by the President) rather than treaties. *Id.* at 169-81.

In the aftermath of the Bricker Amendments controversy, this Court's opinion in *Reid v. Covert* reassured the nation that treaties could not be used to supersede Bill of Rights guarantees while reaffirming the essential holding of *Missouri*. 354 U.S. 1, 14, 18 (1957) (holding that treaties cannot abrogate individual rights while reaffirming *Missouri* and noting that "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government, and the Tenth Amendment is no barrier"). Since then, this Court has continued to emphasize the preemptive force of treaties over state law. *See, e.g.*, *Kolovrat v. Oregon*, 366 U.S. 187, 190-91 (1961) (finding that an Oregon law prohibiting the inheritance of Yugoslavian relatives of property within the state was inconsistent with and must give way to agreements between the U.S. and Yugoslavia and an 1881 treaty); *Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968) ("The several States, of course,

have traditionally regulated the descent and distribution of estates. But those regulations must give way if they impair the effective exercise of the Nation's foreign policy. Where those laws conflict with a treaty, they must bow to the superior federal policy." (citation omitted)); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) ("Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when the Federal Government exercises one of its enumerated constitutional powers, such as treaty making.").

C. This Court Should Not Narrow The Scope Of The Treaty Power By Judicial Fiat.

The history of the treaty power indicates that at various points in the nation's history, detractors have attempted to cabin the treaty power on claims of federalism and states' rights. Those claims have consistently failed, as this Court has again and again reaffirmed the scope of the federal treaty power that the Founders put in place. Even the supporters of the failed Bricker Amendments knew that an amendment was the only proper method for revising the scope of the treaty power. This Court should not accept the invitation of Petitioner and her *amici* to overrule over two centuries of precedent and embark on an uncharted course of judicial activism in foreign affairs. Text, structure, original meaning, and precedent all support only one conclusion in this case: the treaty power is an independent grant of authority to the federal government that was not intended to be limited by a judicially-imposed constraint on the

substantive topics treaties may address based on vague reserved police powers of the states. Nor should this Court invent an amorphous test that would call on courts to second-guess the considered judgment of the branches entrusted with the nation's foreign policy as to what genuinely implicates matters of international concern. Instead, the Court should leave settled precedent well enough alone.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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Supreme Court of the United States

CAROL ANN BOND, *Petitioner*,
v.
UNITED STATES, *Respondent*.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

BRIEF *AMICUS CURIAE* OF U.S. CONGRESSMAN STEVE STOCKMAN, GUN OWNERS FDN., GUN OWNERS OF AMERICA, CITIZENS UNITED'S AMERICAN SOVEREIGNTY ACTION PROJECT, U.S. JUSTICE FDN., THE LINCOLN INSTITUTE, INSTITUTE ON THE CONSTITUTION, THE ABRAHAM LINCOLN FDN., DOWNSIZE DC FDN., DOWNSIZEDC.ORG, POLICY ANALYSIS CENTER, CONSERVATIVE LEGAL DEF. AND ED. FUND, AND TENTH AMENDMENT CENTER IN SUPPORT OF PETITIONER

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Federalist No. 75 18
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Oliver Wendell Holmes, Jr., The Common Law, Univ. of Toronto Law School, Sept. 21, 2011 . 30
N. MacFaruhar, "U.N. Treaty is First Aimed at Regulating Global Arms Sales," (*New York Times*, Apr. 2, 2013) 26, 27
W. Rawle, A View of the Constitution of the United States, reprinted in 4 The Founders' Constitution, Item 13, pp. 571-72 (Kurland, P. & Lerner, R., eds.: Univ. Chi. Press: 1987) . . 24
2 J. Story, Commentaries on the Constitution (5th ed., Little, Brown 1891) . . . . . 18, *passim*
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INTEREST OF *AMICI CURIAE*[1]

Steve Stockman is a Member of the United States Congress representing Texas' 36th Congressional District. Among other committee assignments, of particular relevance to the constitutional treaty power at issue in this case, he serves as a Member of the Subcommittee on Africa, Global Health, Global Human Rights, and International Organizations of the House Foreign Affairs Committee.

Gun Owners Foundation, U.S. Justice Foundation, The Lincoln Institute for Research and Education, Downsize DC Foundation, Policy Analysis Center, and Conservative Legal Defense and Education Fund are exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code ("IRC"). Gun Owners of America, Inc., Citizens United (and its American Sovereignty Action Project), The Abraham Lincoln Foundation for Public Policy Research and Downsize DC.org are exempt from federal income tax under IRC section 501(c)(4). The Institute on the Constitution and the Tenth Amendment Center are educational organizations.

Each of the organizational *amici curiae* was established, *inter alia*, for educational purposes related to participation in the public policy process, which purposes include programs to conduct research, and to inform and educate the public on important issues of

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[1] It is hereby certified that the parties have consented to the filing of this brief and that no counsel for a party authored this brief in whole or in part, and no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

national concern, such as the construction of state and federal constitutions, and criminal and regulatory statutes, federal and state issues.

Gun Owners Foundation, Gun Owners of America, Inc., and Conservative Legal Defense and Education Fund filed an *amicus curiae* brief (Dec. 10, 2010) in support of the petitioner in Bond v. United States, 546 U.S. ___, 131 S.Ct. 2355 (2011).[2]

SUMMARY OF ARGUMENT

This case involves an everyday crime, involving an attempt by one person to injure another, and which fully justified normal state prosecution. There was no reason to make a federal case out of it, as the prosecution did below.

Betrayed by her best friend, Carol Anne Bond attempted to injure the woman through the use of toxic chemicals. Instead of turning the case over to local authorities for investigation and prosecution, the United States Postal Inspection Service, acting outside its narrow authority, turned a local offense into a federal chemical weapons crime, under a statute purportedly enacted by Congress pursuant to the treaty power conferred upon the President and the Senate by Article II, Section 2, Clause 2.

Unfortunately, this federalization of the criminal law has become commonplace. Instead of staying

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[2] http://lawandfreedom.com/site/constitutional/Bond_Amicus.pdf.

within the boundaries of its constitutionally enumerated powers, Congress has acted as if it has plenary police power to penalize inherently state and local conduct.

That is precisely what happened here. Bond was convicted under a statute that was allegedly designed to enforce the nation's obligation under the "Geneva Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons," but was written so incredibly broadly as to reach ordinary household cleaning products. Although she had done nothing even remotely connected to the purpose of the treaty, she was convicted under a statute that requires no evidence of any disregard for the value of human life.

Bond's prosecution not only was misdirected, but also is the product of an unconstitutional abuse of power. The Geneva Convention is a non self-executing treaty. While it is the law of the land, it is not legally enforceable against an individual, but only morally enforceable based on the good faith of the signatory nations. In order for it to apply to a person, Congress must enact a criminal statute pursuant to one of its enumerated powers. Here, the Government argued, and the courts accepted, that the Necessary and Proper Clause permits Congress to punish individual conduct so long as there is a "rational relationship" between the statute and the treaty. This is error. In order for Congress to have the power to act, the purpose of the statute must coincide with the purpose of the treaty. Here, the statute does not prevent any nonstate activity that could lead to the development

and use of chemical weapons in warfare. To the contrary, the language of the statute sweeps so broadly that it makes it a federal crime to pour bleach in another person's fish tank.

Not only is the statute outside any enumerated power, it also violates the Tenth Amendment, which prohibits the federal government from exercising powers reserved to the states and to the people. The Tenth Amendment makes express what is otherwise implied by the structure of the Constitution. As this Court so eloquently stated in 2011 in Bond v. United States, the Amendment's express prohibition on the use of power protects individual liberty. It ensures that the people of each State will not be governed by some remote national or international government entity about matters concerned with their safety, health, and welfare,

Despite this Court's decision in Bond, the court below decided that it was bound by Missouri v. Holland, a case decided, eighty-six years before. The court read Holland's expansive language expansively, and held that the treaty power vests in the federal government a plenary "acquirable police power" to do just about anything it wants.

Petitioner argues that Holland can be read narrowly and, by ignoring certain parts, minimized, so as to permit a Tenth Amendment victory in this case. Petitioner's sanguinity is misplaced. Holland sweeps away any constitutional barrier to the reach of the treaty power, treats the Tenth Amendment as if it did not exist, and grants Congress plenary power to enact

any law on any subject covered by a treaty. In short, the Holland opinion is a blatant and unavoidable affront to a constitutional government of limited powers. It must be confronted — and overruled.

ARGUMENT

I. A PERSONAL VENDETTA HAS BEEN UNJUSTIFIABLY PROSECUTED AS A FEDERAL CRIME.

A. A Domestic Dispute Was Needlessly Made into a Federal Case.

The facts of this case read like an Agatha Christie novel, in that "[m]urder by poisoning was the theme of more than half of [her] novels, plays and short stories."[3] As Agatha Christie learned "a lot about poisons from her work ... in a hospital pharmacy,"[4] Carol Anne Bond, a "trained microbiologist" employed by a chemical manufacturer, learned that certain "chemicals have the rare ability to cause toxic harm to individuals through minimal topical contact." United States v. Bond, 581 F.3d 128, 131-32 (3d Cir. 2009) ("Bond I").

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[3] "Agatha Christie's Murders by Poisoning," A Blog for English Lovers, Dec. 18, 2009, http://speakin-colors.blogspot.com/2009/12/blog-post_7208.html ("Christie Murders Blog").

[4] *Id.*

However, unlike Christie who applied her knowledge of poisons to writing fiction,[5] Bond applied her knowledge to a real-life effort to harm her former closest friend, who had been impregnated by Bond's husband. *Id.* Vowing revenge, in a highly personalized vendetta, Bond "attempted to poison" her adulterous neighbor "at least 24 times over the course of several months." *Id.*, 581 F.3d at 132. Bond "spread [chemicals] on [her neighbor's] home doorknob, car door handles, and mailbox." *Id.* Her neighbor suffered no injury until "on one occasion [when she] sustained a chemical burn to her thumb." *Id.* Initially, the neighbor reported these "chemical attacks" to the local police, who apparently took no action. *Id.* Dissatisfied, the neighbor "complained to her local postal carriers about the chemicals on her mailbox." *Id.*

Based on this single complaint, the United States Postal Inspection Service swung into action, and decided to make a federal case out of a domestic dispute, "placing surveillance cameras in and around [the target neighbor's] home." *Id.* The cameras caught Bond "opening [the neighbor's] mailbox, stealing a business envelope, and placing potassium dichromate inside [the neighbor's] car muffler." *Id.* Prompted by the muffler discovery, the postal inspectors successfully "trace[d] the origin" of the chemical to Bond's employer, and "determined that nearly four pounds of potassium dichromate were missing from a common storage area to which Bond had access." *Id.*

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[5] *See, e.g.*, Christie Murders Blog.

Armed with this evidence, the postal inspectors obtained both an arrest warrant for Bond and a search warrant for her car and home. *Id.* While searching Bond's home, other postal inspectors seized "a piece of [the neighbor's] mail and amounts of the chemicals in Bond's home and car." After arresting Bond, the postal inspectors "took her to a holding cell in the Philadelphia Post Office." *Id.*

Thereafter, federal prosecutors obtained a grand jury indictment against Bond, charging her "with two counts of mail theft, in violation of 18 U.S.C. § 1708," and two counts of possessing and using a chemical weapon, in violation of 18 U.S.C. section 229(a)(1). In the district court, Bond moved unsuccessfully to suppress the evidence seized from her home and to dismiss the two chemical weapons counts. *Id.* After her motions were denied, Bond pled guilty to all charges, reserving the right to appeal. Bond was sentenced to six years imprisonment.

B. The Investigation of a Private Mailbox Metamorphosed into a Chemical Weapons Case.

Although 18 U.S.C. section 3061(a) authorizes postal inspectors "to investigate criminal matters related to the Postal Service and the mails," that authority is expressly limited by 18 U.S.C. section 3061(b), which states that these investigative powers "shall be exercised **only** ... in the enforcement of [i] laws regarding property in the custody of the Postal Service, property of the Postal Service, the use of the mails, and other postal offenses," or [ii] other laws that, as

agreed to by the Attorney General, "have a detrimental effect upon the operations of the Postal Service." (Emphasis added.)

The Postal Inspection Service investigation stretched well beyond these limitations. From the outset of its investigation into Bond's neighbor's complaint, it began with surveillance cameras "in and around" the neighbor's home, and included a search of the premises of Bond's employer. Bond I, 581 F.3d at 132. The postal inspectors obtained an arrest warrant for Bond and search warrants for Bond's car and home, with incarceration occurring, remarkably, in a post office. *Id.*

In the end, Bond's indictment was only tangentially related to "the Postal Service and the mails." To be sure, Bond was indicted on two counts of mail theft in violation of 18 U.S.C. section 1708, but those charges were based upon the happenstance discovery of (i) a business envelope Bond took from her neighbor's mail box, and (ii) a piece of the neighbor's mail found in Bond's house. These two mail counts in the indictment provided thin cover for postal inspectors having exceeded their statutory authority. The Postal Inspection Service reports that its inspectors "enforce more than 200 federal laws in investigations of crimes that may adversely affect or fraudulently use the U.S. mail, the postal system or Postal Service employees."[6] Yet, from this lengthy list, the Postal Service could

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[6] *See* http://about.usps.com/publications/pub278/welcome.htm.

find only incidental mail theft of a couple of envelopes on which to base charges.

Remarkably, the Postal Inspection Service never appeared concerned about the lack of a federal predicate for its investigation. From the outset, the Postal Inspection Service did not hesitate to assume plenary police powers, even though its enforcement powers are expressly limited by 18 U.S.C. section 3061. The postal inspectors simply could have referred the case to the local police or county sheriff. Instead, they insisted on taking the lead in the investigation, up to and including incarcerating Bond in their own offices.[7] Failing to honor its limited mandate, the postal investigators turned a local crime, routinely prosecuted by local government authorities, into a federal case, with international implications.

C. Charging and Convicting Bond of a Violation of 18 U.S.C. Section 229(a)(1) Is Disproportionate to and Misdirected from the Blameworthiness of Her Conduct.

The enthusiasm of the Postal Inspection Service to intrude upon the state police power is fully consistent with the modern trend toward federalization of the criminal law. As documented by the American Bar Association Task Force on the Federalization of Criminal Law, "[t]he fundamental view that local

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[7] In 1971, the Postal Service lost its status as a department of government, and was spun off as a quasi-independent entity, described "as an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. § 201.

crime is, with rare exception, a matter for the states to attack has been strained in practice in recent years"[8]:

> Congressional activity making essentially local conduct a federal crime has accelerated greatly, notably, in areas in which existing state law already criminalizes the same conduct. This troubling federalization trend has contributed to a patchwork of federal crimes often **lacking a principled basis**. [ABA Report, p. 5 (emphasis added).]

It is clear that this case also lacks that "principled basis." As the court of appeals below observed in a lengthy, and candid footnote: "The government has, at different stages of this case, been willing to jettison one legal position and adopt a different one, as seemed convenient"[9]:

> [i]t expressly disclaimed the *Commerce Clause* as a basis for Congress's power to approve the [Chemical Weapons Convention Implementation Act of 1998].... The government still maintained that position the first time it appeared before us, relying only on the Necessary and Proper Clause in support of the Act's constitutionality. Once before the Supreme Court, however, the government decided that this is really a

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[8] *See* The Federalization of the Criminal Law (ABA: 1998). ("ABA Report"), p. 5 (1998).

[9] United States v. Bond, 681 F.3d 149, 152 n.1 (3d Cir. 2012) ("Bond II").

> *Commerce Clause* case, and that the position it had pressed before us is secondary. [Bond II, 681 F.3d at 152 n.1.]

Indeed, all too often, Congress treats the Constitution's enumerated powers as a grab bag of potential authority to criminalize private behavior, unmoored to either constitutional text or history. Latching primarily upon the Commerce Clause, Congress has criminalized behavior based on a person merely crossing a state line. For example, in 1913 the Supreme Court upheld the Mann Act's prohibition of transportation of women for immoral purposes across a state line without requiring any evidence that the activity was commercial, or the law was a regulation of commerce, explaining that "Congress has power over transportation 'among the several states' [and] may [adopt] means [that] have the quality of police regulations." Hoke v. United States, 227 U.S. 308, 323 (1913). So, when this Court struck down the federal law against possession of a firearm in a school zone as outside the power of Congress under the Commerce Clause,[10] Congress responded with a new statute requiring proof that the firearm had moved in, or otherwise affects, interstate commerce. *See* Omnibus Consolidated Appropriations Act of 1997, Pub. L. 104-208, 110 Stat. 3009 (18 U.S.C. § 922(g)).

The ABA Report documented that 40 percent of all federal crimes enacted since the Civil War have been enacted since 1970. *Id.* at 7. That report also

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[10] *See* U.S. v. Lopez, 514 U.S. 549 (1995).

established that "[n]ew crimes are often enacted in a patchwork response to newsworthy events, rather than as part of a cohesive code developed in response to an identifiable federal need." *Id.* at 14–15. Instead of honoring the "deeply rooted principle that the general police power resides in the states — and that federal law enforcement should be narrowly limited —" Congress continues to criminalize more and more conduct, in disregard of "the constitutional vision that the federal government should play a narrowly circumscribed role in defining and investigating criminal conduct...." *Id.* at 17.

Similarly here, 18 U.S.C. section 229 was enacted as part of the Chemical Weapons Convention Implementation Act of 1998, and yet the prohibitory language employed by Congress offers no indication that the section was adopted pursuant to any constitutionally enumerated power. *See* Bond I, 581 F.3d at 134. As the court of appeals below remarked in its examination of the statutory text, "[t]he Act's breadth is certainly striking, seeing as it turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." Bond II, 681 F.3d at 155 n.7.

As Petitioner amply demonstrates, the potential penalties for violation of section 229, and related statutes, are disproportionate to the blameworthiness of Bond's conduct. Brief of Petitioner ("Pet. Br.") at 7. Moreover, the sentence imposed upon Bond for violation of section 229 is much more severe when the sentence that she likely would have received under state law. *See* Pet. Br. at 11-12.

Further, the *mens rea* required to commit the offense defined by section 229 can be met by wholly innocent behavior. The *mens rea* required is the knowing possession or use. The prosecution need not prove that the user or possessor knew, or even should have known, that the chemical possessed or used was "toxic" within the meaning of the statute. As Petitioner points out, the statutory definition of a "toxic chemical" is "extraordinarily capacious," such that even ordinary household cleaning substances would be "presumptively a prohibited chemical weapon." *See* Pet. Br. at 8. While a defendant could rebut that presumption under either the exclusion or the exception for chemicals "intended for peaceful uses," the burden would be on the defendant, not the prosecution. By design, the "peaceful use" exception or exclusion is an affirmative defense.

In contrast, for example, in a prosecution under the Pennsylvania criminal code for a violation of either the assault or aggravated assault statute, it would be the prosecution's burden to demonstrate in a criminal assault trial that the defendant knowingly, intentionally, or recklessly "caused bodily harm." 18 Pa. Cons. Stat. § 2701. Or, in a case such as the one against Bond, a prosecution for aggravated assault would require proof of an "attempt[] to cause serious bodily injury to another ... intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life." 18 Pa. Cons. Stat. § 2702. Either charge would be based upon the degree of Bond's culpability in her various attempts to misuse chemicals to cause serious bodily harm to her neighbor.

From the initial investigation, through the prosecution in this case, up to the Supreme Court and back again, there has been no recognition that the substitution of a "possession" or "use" statute — which could extend to the "pouring [of] a bottle of vinegar in [a] friend's goldfish bowl"[11] — cheapens the moral disapproval that otherwise would attach to Bond's conduct. Stripped of the moral foundation of traditional criminal law, the prosecution here undermines the rich moral precepts that undergird the exercise of the police power traditionally exercised by the States in our federal system. Under the American constitutional republic, it is the several states, not the federal government, that are the repositories of that moral capital.

II. 18 U.S.C. SECTION 229 CONSTITUTES AN UNCONSTITUTIONAL ABUSE OF FEDERAL POWER.

A. The Geneva Protocol Concerns the Misuse of Chemical Weapons in Warfare among Nations.

Spurred by the horrors of the use of chemical weapons in World War I, world leaders met in Geneva, Switzerland and, in 1925, as part of the Geneva Conventions, the convening nations signed a document entitled "Protocol for the **Prohibition of the Use in War** of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare" ("Protocol")

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[11] *See* question posed by Justice Alito, Transcript of Oral Argument at 29. Bond v. United States, 131 S. Ct. 2355 (2011).

(emphasis added).[12] However, the Protocol "did not prohibit the development, production or stockpiling of chemical weapons."[13] It was not until September 3, 1992 that the Conference on Disarmament in Geneva adopted the "Convention on the **Prohibition of the Development, Production, Stockpiling and Use** of Chemical Weapons and on Their Destruction" ("the Convention") (emphasis added),[14] which was signed on January 13, 1993.[15] The United States Senate ratified the treaty on April 25, 1997,[16] and the treaty entered into force on April 29, 1997.[17]

Article I, Section 1.a-b of the treaty[18] prohibits State Parties from undertaking activities "[t]o develop, produce, otherwise acquire, stockpile ...use... retain ... or transfer ... chemical weapons...." Article VII, Section 1.a of the treaty, entitled "National Implementation Measures," requires that "[e]ach State

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[12] http://www.un.org/disarmament/WMD/Bio/pdf/Status_Protocol.pdf. Little did the signers of this document know that their warfare treaty between nations would criminalize certain behavior by a scorned Pennsylvania housewife.

[13] http://www.un.org/disarmament/WMD/Chemical/.

[14] *Id.*

[15] 32 I.L.M. 800 (1993).

[16] S.RES.75, 105th Congress, http://www.gpo.gov/fdsys/pkg/BILLS-105sres75ats/pdf/BILLS-105sres75ats.pdf.

[17] http://www.fas.org/nuke/control/cwc/chron.htm.

[18] 32 I.L.M. 800 (1993).

Party shall, **in accordance with its constitutional processes**, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall ... [p]rohibit natural and legal persons anywhere on its territory ... from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity...."

The Senate ratification (S.Res.75) confirmed that it "advise[d] and consent[ed] to the ratification of the Convention ... subject to the following conditions...." Section 2, subsection (12) of that resolution is entitled "Primacy of the United States Constitution," and states that "[n]othing in the Convention requires or authorizes legislation, or other action, by the United States **prohibited by the Constitution** of the United States, as interpreted by the United States" (emphasis added). Further, Section 2, subsection (28) states that, "[i]n order to protect United States citizens against unreasonable searches and seizures ... for any challenge inspection conducted on the territory of the United States ... the United States National Authority will first obtain a criminal search warrant based upon probable cause, supported by oath or affirmation, and describing with particularity the place to be searched and the persons or things to be seized...." This requirement to obey the Constitution while implementing the treaty is echoed by section 305 of Public Law 105-277 (codified at 22 U.S.C. § 6725), the implementing statute. Thus, Congress took steps to ensure the treaty and implementing statute be interpreted consistent with the Constitution.

In 1998, as part of the Omnibus Consolidated and Emergency Supplemental Appropriations Act,[19] Congress enacted the Chemical Weapons Convention Implementation Act of 1998, now codified at 18 U.S.C. section 229, *et seq*. 18 U.S.C. section 229(a) mirrors the language of the treaty, while adding certain additional prohibitions, stating that "it shall be unlawful for any person knowingly ... to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, **own**, **possess**, or use, or **threaten to use**, any chemical weapon; or ... to **assist or induce** ... or to **attempt or conspire**..." (emphasis added).

The treaty discusses "state parties," not individuals; it clearly has the purpose to stop chemical warfare, and prevent the use of chemical weapons by state actors. It does not appear to envision affecting individuals, other than the requirement for legislation prohibiting non-state actors from acquiring and using chemical weapons. However, Congress erroneously assumed that it had plenary power to enact section 229 pursuant to the treaty power, subject only to certain express prohibitions protecting individual rights in the Bill of Rights. *See* Reid v. Covert, 354 U.S. 1, 16-18 (1957).

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[19] 105 P.L. 277; 112 Stat. 2681, http://www.gpo.gov/fdsys/pkg/PLAW-105publ277/pdf/PLAW-105publ277.pdf.

B. Section 229 of the Chemical Weapons Convention Implementation Act Is an Unconstitutional Means to Meet the U.S. Treaty Obligation.

The Convention is not a self-executing treaty. *See* Pet. Br., at 3-5. Rather, it is simply an "agreement[] between sovereign and sovereign." *See Federalist No. 75*, p. 388 (G. Carey and J. McClellan, eds., Liberty Fund: 2001). Therefore, "[i]ts object[] [is a] CONTRACT with foreign nations which ha[s] the force of law, but derive[s] it from the obligation[] of good faith." *Id.* The Convention's provisions, then, "are not rules prescribed by the sovereign to the subject." *Id.* In summing up this original understanding of the nature of the legal obligation of a non-self-executing treaty, Joseph Story explained:

> The power of making treaties is plainly neither [legislative] nor [executive]. It relates neither to the execution of subsisting laws, nor to the enactment of new ones; and still less does it relate to the exertion of the common strength. Its objects are contracts with foreign nations, which have the force of law with us, but, as to foreign sovereigns, have only the obligation of good faith. Treaties are not rules prescribed by the sovereign to his subjects; but agreements between sovereign and sovereign. [2 J. Story, Commentaries on the Constitution, § 1519, p. 346 (5th ed., Little, Brown 1891).]

To be sure, as a treaty made under the authority of the United States, the Convention is the Supreme Law

of the Land, legally binding upon the nation, but that does not mean that it is anything more than a contractual obligation, enforceable against the United States.[20] As St. George Tucker observed, a treaty "should be regarded as a part of the supreme law of the land [and] the honour and peace of the nation certainly require that its compacts should be duly observed, and carried into effect with perfect good faith." St. G. Tucker, View of the Constitution of the United States, p. 270 (Liberty Fund: 1999) ("Tucker's View"). In short, a treaty is "an inchoate act" (*id.*), the international enforcement of which depends upon the good will among nations, and the domestic enforcement by laws enacted by Congress according to the powers vested in it by the Constitution:

> [W]hen a treaty stipulates regulations on any of the subjects submitted by the constitution to the power of Congress, it must depend on its execution, as to such stipulations, on a law or laws to be passed by Congress; and it is the constitutional right and duty of the house of representatives, in all such cases, to deliberate on the expediency, or inexpediency, of carrying the treaty in effect, and to determine and act thereon, as in their good judgment, may be most conducive to the public good. [*Id.* at 271-72.]

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[20] *See* Medellin v. Texas, 552 U.S. 491, 505 (2008) ("A treaty is, of course, 'primarily a compact between nations' ... it ordinarily depends for enforcement of its provisions on the interest and honor of the governments which are parties to it.").

Tucker concluded that any "contrary construction would render the power of the president and senate paramount to that of the whole congress, even on those subjects upon which every branch of congress is, by the constitution, required to deliberate." *Id.* at 277.

In Bond I, and in recognition that Congress does not have plenary power to enact laws enforceable against the people, the government argued that Congress was empowered by the Necessary and Proper Clause to enact section 229 "as a law enforcing its Treaty Power." *Id.*, 581 F.3d at 134. Remarkably absent the lower court's first opinion is any effort to analyze this claim pursuant to the well-established rule in McCulloch v. Maryland, which requires a court to assess the purpose of the law and the legitimacy of that purpose.[21] *See* Bond I, 581 F.3d at 134-35, Instead, the court focused exclusively upon the Tenth Amendment claim, dismissing it on the ground of lack of standing. *Id.*, 581 F.3d at 135-38.

In Bond II, the court of appeals below addressed the Necessary and Proper question, but dismissed it by reference to a single statement in Missouri v. Holland,[22] that purportedly established that "the ...

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[21] 17 U.S. (4 Wheat) 316, 421 (1817) ("Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

[22] 252 U.S. 416 (1920).

relevant question is whether the underlying treaty is valid"[23]:

> In *Missouri v. Holland*, the Supreme Court declared that, if the treaty is valid, "there can be no dispute about the validity of the statute [implementing it] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government." [Bond II, 681 F.3d at 152.]

Having relied solely upon Holland, the Bond II court below omitted the purpose analysis required by McCulloch. Instead, it assumed that Holland foreclosed any inquiry related to the purpose of section 229. Thus, the court ruled that the provision was constitutional under the Necessary and Proper Clause solely because it was "rationally related" to the implementation of a treaty. *See* Bond II, 681 F.3d at 157-58 and n.9. While the court below relied upon two decisions from its sister circuits, it did not -- indeed, it could not — find any language in McCulloch to justify the dispensing of its purpose inquiry in the application of the Necessary and Proper Clause to congressional legislation implementing a treaty. Nor is there any good reason for such a dispensation. Rather, there is a very good reason to examine carefully the claimed purpose of a law purportedly enacted under the Necessary and Proper Clause as a means of enforcing a treaty domestically.

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[23] Bond II, 681 F.3d at 153.

Until the enactment of the Convention in 1998, the Geneva Convention on chemical weapons was enforceable only internationally as a contract between the United States and the other signatory nations. As a non-self-executing treaty, the Convention contained no rule enforceable against an American citizen. Section 229 changed that, its broad language "turn[ing] each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache ... [and] expos[ing] a person to years in federal prison." *See* Bond II, 681 F.3d at 155 n.7.

The far-reaching language of section 229 refutes on its face any notion that the section was enacted by Congress for the purpose of strengthening the nation's contractual obligation in the Geneva Convention. Section 229 does not read like a statute designed as a preventive measure or preemptive strike against nonstate activity that could lead to the development and use of toxic chemicals by the United States in warfare. On its face, section 229 is not designed as a prophylaxis to the misuse of chemicals in warfare, but as a pretext "for the accomplishment of objects not entrusted to the [federal] government" and, therefore, outside the power vested in Congress by the Necessary and Proper Clause. *See* McCulloch, 17 U.S. at 423.

C. Section 229 Violates the Tenth Amendment.

In his Commentaries on the Constitution, Joseph Story warned that the treaty power vested in the President and the Senate, although "general and

unrestricted," it is "not be so construed to destroy the fundamental laws of the State"[24]:

> A power given by the Constitution cannot be construed to authorize a destruction of other powers given in the same instrument. It must be construed, therefore, in subordination to it; and cannot supersede or interfere with any other of its fundamental provisions. [*Id.* at 339.]

There is no more fundamental provision in the United States Constitution than the Tenth Amendment in the Bill of Rights. As this Court unanimously concluded in Bond v. United States[25]:

> The principles of limited national powers and state sovereignty are intertwined. While neither originates in the Tenth Amendment, both are expressed by it. Impermissible interference with state sovereignty is not within the enumerated powers of the National Government ... and action that exceeds the National Government's enumerated powers undermines the sovereign interests of States. [Bond III, 131 S. Ct. at 2366.]

Feeling bound by Missouri v. Holland's crabbed view of the Tenth Amendment, the court below departed from this high view of the Tenth Amendment's

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[24] 2. Story's Commentaries, § 1508, at 339. *See also* St. G. Tucker, Limitations on the Treat-Making Power, § 122, p. 139 (Law Book Exchange, N.J.: 2000).

[25] 564 U.S. __, 131 S. Ct. 2355 (2011) ("Bond III").

protective reach. However, the Holland court neglected the Amendment's history and original purpose. *See* Bond II, 681 F.3d at 156. As noted above, Joseph Story warned against an expansive interpretation of the treaty power that could "annihilate" other authorities, "chang[ing] the organization of government [or] overturn[ing] its republican form." *See* Story's Commentaries at 339. Confidently, Story contended that any such treaty would be found "void; because it would destroy, what [the constitution] was designed ... to fulfill, the will of the people." *Id.* St. George Tucker likewise worried that, because "there is no[] restriction as to the subjects of treaties," there were only two constitutional guarantees that protected the States, the one securing to the states "a republican form of government" and the other securing the States' authority to self-protection against invasions. Tucker's View at 269. In sum, both Story and Tucker cautioned that the treaty power not be read in a way that, in Tucker's words, would "dismember[] the federal republic." *Id.*

But that is precisely what the court below seems to have decided in its reliance on Justice Holmes's opinion in Holland, ruling that, while there is "[n]o doubt the great body of private relations usually fall within the control of the State ... a treaty may override its power." Holland, 252 U.S. at 434.

At the heart of the constitutional guarantee of a republican form of government to every state is the principle that the laws are to be enacted by the representatives of the people of each State. *See* W. Rawle, A View of the Constitution of the United

States, reprinted in 4 The Founders' Constitution, Item 13, pp. 571-72 (Kurland, P. & Lerner, R., eds.: Univ. Chi. Press: 1987). In turn, the Tenth Amendment reserves to the States powers not delegated to the federal government. Traditionally, the powers reserved to the States are commonly known as the police powers, including public safety, health, and welfare. Under the guise of implementing the Convention against the use of toxic chemicals in warfare among nations, Congress has enacted section 229, utilizing such broad language that it invades the States' sovereign police powers. If allowed to stand, it will introduce a wholly new chapter of the transfer of power from the States to the federal government via the treaty power, in a world that is increasingly trending toward the internationalization of human rights, imposing upon states "obligation[s] to protect ... civil and political rights or economic, social and cultural rights." *See* T. Buergenthal, D. Shelton, & D. Stewart, International Human Rights in a Nutshell, p. 27 (4th ed. 2009). In this contemporary drive for increasingly transnational enforcement of universal norms is the "widespread international political acceptance of the proposition that democracy is a precondition for the effective protection of human rights." *Id.* at 26.

At stake, then, in the setting of constitutional parameters to the treaty power is whether the American federal republic, in which powers are divided between a national and several State governments, will survive, or whether the treaty power will be used to "annihilate" our system of checks and balances that otherwise would stand in the way of a national

democracy unlimited by independent and sovereign States.

The overriding design and purpose of the Tenth Amendment is to secure America's federal structure so as to better secure and preserve "individual liberty." *See* Bond III, 131 S. Ct. at 2364. The Amendment does that by ensuring that "the enactment of positive law [is left] to the initiative of those who seek a voice in shaping the destiny of their own times without having to rely solely upon the political processes that control a remote central power." *Id.* To that end, the treaty power must be made subordinate to the Tenth Amendment, first because it is a power that can be exercised unchecked by the House, which is the legislative branch of the national government closest to the people. Second, the treaty can be misused as a vehicle to transfer the power reserved to the people and to the States to international bodies, disenfranchising the people of the several States and imposing upon the people of the States a totally foreign political or moral standard.

Indeed, on April 2, 2013, the United Nations General Assembly overwhelmingly "approve[d] a pioneering treaty aimed at regulating the enormous global trade in conventional weapons, for the first time linking sales to the human rights records of the buyers." N. MacFaruhar, "U.N. Treaty is First Aimed at Regulating Global Arms Sales," (*New York Times*, Apr. 2, 2013).[26] The object of the treaty is not

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[26] http://www.nytimes.com/2013/04/03/world/arms-trade-treaty-approved-at-un.html?nl=todaysheadlines&emc=edi

commercial. Rather, it purportedly "reflects growing international sentiment that the multibillion-dollar weapons trade needs to be held to a **moral standard**." *Id.* (emphasis added). Indeed, the treaty "calls for sales to be evaluated on whether the weapons will be used to break humanitarian law." Such an international gun control treaty could not only serve as a pretext for centralizing the regulation of firearms in the United States, but also as a pretext for globalizing gun control, including a ban on so-called "assault weapons." While the Second Amendment would stand as a bulwark against numerous measures that might be enacted by Congress, the Tenth Amendment is the front-line defense of the right of the people of each state to set the moral standards governing the transfer and use of firearms within their respective local jurisdictions.

III. MISSOURI V. HOLLAND SHOULD BE OVERRULED.

A. Missouri v. Holland's Rejection of the Tenth Amendment Cannot Be Ignored as Dicta.

Petitioner's brief minimizes the impact of Missouri v. Holland, arguing only in the alternative that "[t]o the extent *Holland* is to the contrary, it would need to be overruled." Pet. Br. at 18. Petitioner argues that the court below misinterpreted and "broadly construed *Holland*," arguing that "*Holland* does not stand for

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th[e] alarming proposition" that the treaty power can be used to override the "structural constraints on Congress' power." *Id.* at i, 17. Unfortunately, *amici* do not believe Holland can be construed away so easily. It is Holland's language that is expansive, not merely the lower court's reading of it. Holland was plain error. The Court should recognize this error and correct it, rather than rationalizing it away, allowing it to continue to fester.

Petitioner characterizes Holland's expansive view of the treaty power as nothing more than "dictum." *Id.* at i. Petitioner argues that "the constitutional attack and this Court's reasoning [in Holland] focused on the validity of the treaty," whereas the focus of this case is the constitutionality of the implementing statute. *Id.* at 17. Petitioner argues that the Court in Holland addressed the statute "[a]lmost in passing." *Id.* at 17.

But there is not just a single "dictum" in Holland that can be conveniently ignored. Rather, the opinion is chock full of perversely unconstitutional statements. Holland declared that the government's treaty power is, in essence, extra-constitutional, stating that "[a]cts of Congress are the supreme law of the land only when made in pursuance of the Constitution, while treaties are declared to be so when made under the authority of the United States." *Id.*, 252 U.S. at 433. Holland explicitly states that there are subjects "that an act of Congress could not deal with but that a treaty followed by such an act could...." *Id.*

On the contrary, the "authority of the United States" is limited to that which is delegated by the

Constitution. Contrary to Holland, the government has no reservoir of "'power which must belong to and somewhere reside in every civilized government....'" *See id.* Simply alleging that something is so obvious that it "must" be true does not make it true. There is nothing "inherent" about federal power — there is only what the Constitution says.

Simply because all other governments historically possess a power does not mean that our federal government possesses that power, especially since our form of government was designed to be a break with history, and a new experiment. Nowhere does the Constitution delegate "all powers which are so obvious that they must reside in every civilized government" — rather it denies the majority of power to the federal government, reserving it to the States, even though that may be power that other "civilized governments" generally possess.

The Holland Court viewed the Constitution as having "called into life a being the development of which could not have been foreseen.... *Id.* at 433. Thus, the Court decried the Constitution, stating that "the case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago." *Id.*

This disregard is no wonder, since Holland was written by Justice Holmes, who believed that "[t]he life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which

judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed." Oliver Wendell Holmes, Jr., The Common Law, Univ. of Toronto Law School, Sept. 21, 2011, p. 5. Holmes embraced this notion, seeming to believe that the law — presumably including even the Constitution — should be used in "degree to which it is able to work out desired results...." *Id.*

In so many words, Holland rejects the Constitution's delineation of what powers the federal government **does** possess, and replaces it with the Court's vision of what powers a "civilized government" **should** possess. Thus, Holland cannot be ignored. It is an affront to a constitutional government of limited powers. It must be confronted — and overruled.

B. Not Only Was Holland's View of the Treaty Power Erroneous, Its Holding Was Based on an Outdated View of the Tenth Amendment.

In one of the most poorly reasoned opinions ever to be handed down by the Supreme Court, Missouri v. Holland, the Court held that the express delegation of the power to enter treaties meant that Congress could legislate — pursuant to a treaty — about anything which "does not contravene any prohibitory words to be found in the Constitution." 252 U.S. 416, 434 (1920). In other words, the Holland Court believed that the founders went to great trouble to craft an entire constitution of limited, enumerated powers —

and then undid it all through the grant of the treaty power.

According to Holland, all that a President and the Senate would need do is sign and ratify a bogus treaty with Canada, stating that each nation will "enact all statutes which are beneficial to the international community." Congress would then be free to enact any statute it wished, without limitation, so long as it did not contravene Congress' understanding of some "express prohibition" found in the Constitution.

But, of course, the Chemical Weapons Convention Implementation Act, like the Migratory Bird Treaty Act, does contravene prohibitory words disregarded by the Holland Court — specifically, those found in the Tenth Amendment — that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution grants to Congress neither the power to regulate birds in Missouri nor the power to regulate Bond's domestic misuse of a common photography chemical. The Holland Court chose to overlook this, instead mocking the Tenth Amendment's prohibition on federal power as mere "invisible radiation from ... general terms...." *Id.* at 434. At the time, the Tenth Amendment was regarded as nothing more than a "truism,"[27] simply an editorialization on the Constitution's federal structure of limited powers. Of course, that idea flies in the face of the most basic of tenets of constitutional

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[27] United States v. Darby, 312 U.S. 100, 124 (1941).

interpretation that "every word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added." Holmes v. Jennison, 39 U.S. 540, 570-571 (1840).

As the Court below recognized, Missouri v. Holland stands for the proposition that Congress may use the treaty power to circumvent any limitation imposed by the Tenth Amendment, along with the "structural limitations on federal power."[28] Were it not for the treaty power, Congress never would have had the authority to enact the chemical weapons statute under which Bond was convicted.

The result in Missouri v. Holland may have seemed desirable to the Court — but it was hardly constitutional. The outcome of this case is neither desirable nor constitutional, but is simply the ruthlessly logical result of what Holland set into motion. Holland blessed the idea that, through the simple enactment of a treaty, our entire form of government could be transmorphed from one of limited, enumerated powers, to one where the President and the Senate hold plenary, "acquirable police power[s]." 681 F.3d at 170.

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[28] 681 F.3d 149, 151, 155 (3rd. Cir. 2012) ("Missouri v. Holland ... is sometimes cited for the proposition that the Tenth Amendment has no bearing on Congress' ability to legislate in furtherance of the Treaty Power....").

This Court in other cases has rejected such an absurd principle. In Reid v. Covert,[29] this Court recognized that "[t]he concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government." *Id.* at 14.

The Court continued that "[t]he obvious and decisive answer to this, of course, is that no agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." Reid further stated that "[i]f our foreign commitments become of such nature that the Government can no longer satisfactorily operate within the bounds laid down by the Constitution, that instrument can be amended by the method which it prescribes. But we have no authority, or inclination, to read exceptions into it which are not there." *Id.*

To be fair, Reid v. Covert distinguished Holland, noting that "the treaty involved was not inconsistent with any specific provision of the Constitution." *Id.* at 18. But it did so based on a view of the Tenth Amendment which is now outdated, and should be

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[29] 354 U.S. 1, 15 (1957) ("At the time of Mrs. Covert's alleged offense, an executive agreement was in effect between the United States and Great Britain which permitted United States' military courts to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents.").

explicitly rejected by this Court. When Holland was written, the Court viewed the Tenth Amendment as "intended to confirm the understanding of the people at the time the Constitution was adopted.... It added nothing to the instrument as originally ratified and has no limited and special operation ...." United States v. Sprague, 282 U.S. 716, 733-734 (1931).

However, since the days of cases like Darby and Sprague, the Court has discarded such dismissive language, perhaps coming to recognize (but not yet admit) that the Tenth Amendment might be something more than superfluous language. In Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (overruled on other grounds), the Court stated that it "recognized that an express declaration of this limitation [on federal power] is found in the Tenth Amendment...." *Id.* at 842. In Fry v. United States, 421 U.S. 542 (1975), the Court wrote that "[w]hile the Tenth Amendment has been characterized as a 'truism,' stating merely that 'all is retained which has not been surrendered' ... it is not without significance. The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 547 n.7.

The Third Circuit below ignored these more recent discussions of the Tenth Amendment, holding that it "need .... not ... determine whether the Tenth Amendment is a tautology ... or ... an independent

check on federal power,"[30] since Holland already had foreclosed the Tenth Amendment argument. Even as recently as this Court's first decision in this case, Bond v. United States, 131 S. Ct. 2355 (2011), the Court still has not decided "[w]hether the Tenth Amendment is regarded as simply a 'truism' ... or whether it has independent force of its own...." *Id.* at 2366.

If the Tenth Amendment is a meaningful and independent prohibition on the extent of federal power, then the treaty power may not be used to circumvent it. If the structure of our federal system, where the national government enjoys only enumerated powers, has any meaning, then the treaty power cannot override it.

It is far past time for the Court decide whether the Tenth Amendment is a toothless truism, and whether there really is any limit on the reach of federal power. Thus, the Court should overrule Missouri v. Holland.

CONCLUSION

The decision of the court below should be reversed.

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[30] *Id.*, 681 F.3d at 155 n.8.

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AMICUS CURIAE BRIEF

RECORD
AND
BRIEFS

No. 12-158

In The
Supreme Court of the United States

CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE COMMONWEALTH OF VIRGINIA AND THE STATES OF ALABAMA, ALASKA, GEORGIA, IDAHO, KANSAS, MONTANA, NEBRASKA, SOUTH CAROLINA, WEST VIRGINIA, AND WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONER

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1 *Restatement (Third) of Foreign Relations Law of the United States* § 325(1) (1986) 9

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Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867 (2005) 17, 23

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The Federalist No. 45 (C. Rossiter ed., 1961) (Madison) 4, 15, 18

STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF AMICI TO FILE

The Commonwealth of Virginia and the States of Alabama, Alaska, Georgia, Idaho, Kansas, Montana, Nebraska, South Carolina, West Virginia, and Wisconsin (hereinafter "the Amici States") possess plenary police powers to criminalize, set the appropriate penalty for, and prosecute assaults of the sort committed by Petitioner Bond. The Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-856, codified at 18 U.S.C. § 229 ("The Federal Chemical Weapons Act" or "the Act"), as the federal government has interpreted it in this case, strikes a different policy balance on punishing the assault in question than that chosen by Pennsylvania, the relevant State. *See Bond v. United* States, 131 S. Ct. 2355, 2366 (2011) ("The public policy of the Commonwealth of Pennsylvania, enacted in its capacity as sovereign, has been displaced by that of the National Government."); *see also* 18 Pa. Cons. Stat. § 2701 (simple assault); *id.*, § 2702 (aggravated assault). The Amici States have an interest in affirming that the United States may not displace state criminal law where, as here, the federal government is acting far beyond its enumerated powers in a way that is not necessary and proper to the fulfilling of the United States' treaty obligations. *See* U.S. Const. art. II, § 2; *Bond*, 131 S. Ct. at 2364-66 (noting that "[t]he federal balance is . . . an end in itself, to ensure that States function as political entities in their own right," that States and individuals have an essential role in

vindicating "[f]idelity to principles of federalism," which implicate "a State's constitutional interests," and that those interests are undermined when the federal government takes an "action that exceeds the National Government's enumerated powers."); Sup. Ct. R. 37(4).

SUMMARY OF ARGUMENT

The Third Circuit in its opinion below believed that it was bound by *Missouri v. Holland*, 252 U.S. 416 (1920), to uphold Petitioner's conviction under 18 U.S.C. § 229 against a claim that Congress had exceeded its constitutional powers. That belief rested on *Holland*'s statement that "if [a] treaty is valid there can be no dispute about the validity of the statute under Article I, § 8, as a necessary and proper means to execute the powers of the Government." *Holland*, 252 U.S. at 432; *see United States v. Bond*, 681 F.3d 149, 151, 156-57, 162-64 (3d Cir. 2012); *cf.* U.S. Const. art. I, § 8, cl. 18 (granting Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"); U.S. Const. art. II, § 2 (granting the President "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur").

The Amici States first submit that the rule of *Holland* is not triggered because the Act in question,

as the federal government has interpreted and applied it to Petitioner, goes well beyond implementing the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Convention), *opened for signature* Jan. 13, 1993, S. Treaty Doc. No. 21, 103d Cong., 1st Sess. (1993), 1974 U.N.T.S. 45; 143 Cong. Rec. 5812 (1997). If the Act is understood to criminalize the assault committed by Petitioner, Congress clearly exceeded the scope of implementation because that conduct would not have violated the Convention if committed by any of the State Parties to the Convention. While the United States did agree to forbid conduct by its citizens and residents that would violate the Convention if committed by a State Party actor, the displacement of State law here was not required and therefore was not a necessary and proper execution of the Convention within Congress' Article I power.

Second, if *Holland* does provide the rule of decision and if the powers granted by the Necessary and Proper Clause in the usual case support implementing legislation, the Amici States submit that the decision in *Holland*, at least as it is understood by the federal government in this case, is no longer good law because it does not reflect subsequent doctrinal development with respect to the Proper prong of the Necessary and Proper Clause. In the last two decades, this Court has repeatedly held that congressional enactments that violate the principles of Structural Federalism are not proper laws for carrying into execution its enumerated

powers. This Court should clarify that *Holland* does not authorize an exception to those principles that permits Congress to augment its powers through the use of a treaty in a fashion that is tantamount to amending the Constitution or assuming a plenary police power. To affirm the reasoning in *Holland* would be to cast aside the principle that "'the powers delegated . . . to the federal government are few and defined,'" with the remainder being reserved to the States and the people. *United States v. Lopez*, 514 U.S. 549, 552 (1995) (quoting The Federalist No. 45, at 292-93 (C. Rossiter ed., 1961) (Madison)).

Finally, the Amici States submit that this Court should reject the proposition that the President, the Senate, and a foreign power may reach an agreement which thereby expands Congress' Article I authority, increasing the legislative prerogatives of the House of Representatives, the Senate, and the President. *See Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion) (rejecting "the Government's conten[tion] that [an act of Congress] can be sustained" over a valid constitutional objection on the ground that it is "legislation which is necessary and proper to carry out the United States' obligations under the international agreements made" by treaty). "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Id.* And no permissible "'reading[ ] of the . . . scope of federal power . . . would permit Congress to exercise a police power.'" *United States v. Morrison*, 529 U.S.

598, 618-19 (2000) (quoting *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)). The broadly stated rule in *Holland* is also contrary to text because the power to be executed by the Necessary and Proper Clause is the power to "make Treaties." As a consequence, implementation, where necessary, must ultimately depend upon enumerated powers.

ARGUMENT

It cannot be seriously questioned that under the facts of this case there is something deeply unsettling about Congress' move to displace the Pennsylvania state law of assault with The Federal Chemical Weapons Act. The opinion of the Third Circuit itself acknowledged that the interpretation put on the Act by the federal government gives it a "breadth [that] is certainly striking, seeing as it turns each kitchen cupboard and cleaning cabinet in America into a potential chemical weapons cache." *Bond*, 681 F.3d at 154 n.7. Nor did the Third Circuit feel itself able to repel or refute "Justice Alito's statement during oral argument" in *Bond*, 131 S. Ct. 2355, "that 'pouring a bottle of vinegar in [a] friend's goldfish bowl' could constitute the use of a chemical weapon under the Act and expose a person to years in a federal prison." *Bond*, 681 F.3d at 154 n.7. Even so, the Third Circuit brushed aside all Federalism concerns in concluding that *Holland* provides this discordant and inflexible rule of decision: a statute that Congress passes with the avowed purpose of implementing a valid treaty is

ipso facto constitutional under the Necessary and Proper Clause. *Bond*, 681 F.3d at 151 (quoting *Holland*, 252 U.S. at 432, for the proposition that "'there can be no dispute about the validity of [a] statute' that implements a valid treaty.").

This analysis is wrong for at least three reasons. First, the *Holland* precondition is not even met: to the extent that this law has been drafted to reach the assault in this case—or the pouring of vinegar into a goldfish bowl,—it does not actually implement the treaty at issue. Second, the proposition derived from *Holland* by the federal government is no longer good law because it was decided before the more recent doctrinal development of the Proper prong of the Necessary and Proper Clause. And third, the notion that the President and the Senate, through agreement and ratification of a treaty, may grant to Congress powers otherwise withheld lacks textual support and is inconsistent with the notion of a written constitution under which "[t]he powers of the [national] legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written.'" *Morrison*, 529 U.S. at 607 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.)). Moreover, federal assumption "of the police power, which the Founders denied the National Government and reposed in the States," is at odds with our constitutional structure and history: "the suppression of violent crime and vindication of its victims" is uniquely the province and duty of the States. *Id.* at 618. "The Constitution

requires a distinction between what is truly national and what is truly local." *Id.* at 617-18.

I. The *Holland* Precondition Has Not Been Met and Thus Its Reasoning Does Not Control.

Amici States do not take issue with whether the President, with the Senate's advice and consent, had authority to enter into the Convention, *see* U.S. Const. art. II, § 2, or whether the United States assumed and retains international obligations under the Convention. Rather, Amici States contend—even assuming *Holland* is good law—that the Convention does not provide a constitutionally adequate predicate to Congress' passage of The Federal Chemical Weapons Act to the extent the Act purports to interfere in a traditional prerogative of the States and goes beyond what is required by the Convention. *See* 18 U.S.C. § 229(a)(1).

This latter feature of the Act distinguishes this case from *Holland*. There the question was "whether the treaty *and* statute [we]re void as an interference with the rights reserved to the States," that is, whether the subject matter implicated by that particular international obligation, the regulation of wildlife while in the sovereign territory of a state, was entirely beyond the authority of the federal government. *Holland*, 252 U.S. at 432 (emphasis added). There was no question but that the Migratory Bird Treaty concluded between the United States and

Great Britain, 39 Stat. 1702-05 (1916), obligated the United States to adopt the prohibition imposed by the Migratory Bird Treaty Act, 65 Pub. L. No. 186, 40 Stat. 755-57 (1918), and thereby discharge the obligations assumed by the United States under that Treaty. *See Holland*, 252 U.S. at 430-32.

Here we are confronted with a second order issue: what Congress may enact as implementing legislation under its Necessary and Proper Power once a treaty has been ratified. More precisely, the case raises the issue whether, in the exercise of that power, Congress may gratuitously go beyond the scope of the international obligations assumed by a treaty in order to claim a portion of the States' traditional police powers and so expand its Article I authority. This is what Congress has done in enacting 18 U.S.C. § 229 and this is something it cannot properly do. *See Neely v. Henkel*, 180 U.S. 109, 121 (1901) ("The power of Congress to make all laws necessary and proper for carrying into execution . . . the powers enumerated in section 8 of Article I of the Constitution, as [well as] all others vested in the Government of the United States, or in any Department or the officers thereof, includes the power to enact such legislation *as is appropriate* to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the Senate to insert in a treaty with a foreign power." (emphases added)). As this Court long ago noted, "[i]t would be manifestly contrary to the objectives of those who created the Constitution, as

well as those responsible for the Bill of Rights—let alone alien to our entire constitutional history and tradition—to construe" any part of the Constitution "as permitting the United States to exercise power under an international agreement without observing constitutional prohibitions. In effect, such construction would permit amendment to that document in a manner not sanctioned by Article V. The prohibitions of the Constitution were designed to apply to all branches of the National Government and they cannot be nullified by the Executive or by the Executive and the Senate combined." *Reid*, 354 U.S. at 17.

To understand the obligations undertaken by the Convention, and thus those that may provide the basis for an exercise of Congress' implementation authority, the Convention's text, purpose, and the context in which its terms were used, should all be considered. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 337-38, 346 (2006) (reciting the Vienna Convention's purpose and quoting 1 *Restatement (Third) of Foreign Relations Law of the United States* § 325(1) (1986) to the effect that "'[a]n international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose'"); *see also Abbott v. Abbott*, 560 U.S. 1, ___, 130 S. Ct. 1983, 1990 (2010) (citing "the purposes of the Convention" as one of the factors informing the Court's construction of a treaty's terms); *see, e.g.*, *United States v. Alvarez-Machain*, 504 U.S. 655, 666

(1992) (construing "the language of [a] Treaty, in the context of its history" to hold that it does not embrace certain conduct).

The Convention recites in its preamble the context of its enactment and the purpose for the agreement and so reveals that it is aimed at regulating the use of chemicals for *warlike* uses, not mere civil violence or criminality. *See* Convention Preamble; (Pet. App. 146-47). A few excerpts from the Preamble make this plain. The first recital speaks to the "State Parties'" determination "to achieving effective progress towards general and complete disarmament under strict and effective international control, including the prohibition and elimination of all types of *weapons of mass destruction*." Convention Preamble ¶ 1 (emphases added); (Pet. App. 146). The third recital recalls "that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Protocol for the Prohibition *of the Use in War* of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods *of Warfare*. . . ." Convention Preamble ¶ 3 (emphases added); (Pet. App. 146). And the seventh recital recognizes "the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides *as a method of warfare*." Convention Preamble ¶ 7 (emphases added); (Pet. App. 147). This statement of purpose demonstrates that the Convention's key terms, such as "chemical weapon," *see* Convention Art. II.1(a)-(c); (Pet. App. 149), are to

be interpreted in connection with military or paramilitary action aimed at other sovereign powers. *See* Convention Art. I.1(c) (requiring that State Parties commit to not "engage in any *military preparations* to use chemical weapons" (emphases added)); (Pet. App. 149); Convention Art. I.5 (requiring that State Parties "undertake[ ] not to use riot control agents *as a method of warfare*" (emphases added)); (Pet. App. 148); *see also* 143 Cong. Rec. S3309 (daily ed. Apr. 17, 1997) (statement of Sen. Reid) (arguing that the Convention was about arms proliferation and contending that it "will make it less likely that our Armed Forces will ever again encounter chemical weapons *on the battlefield*, less likely that rogue states will have access to the material needed to build chemical arms, and less likely that such arms will fall into the hands of terrorists." (emphases added)); 143 Cong. Rec. S1371 (daily ed. Feb. 13, 1997) (statement of Sen. Kerry) ("It is a very material fact that the Chemical Weapons Convention is primarily about increasing the safety of the United States, of our troops, and our citizens from the chemical weapons *of other nations*." (emphases added)).

It is true that the Convention defines "Chemical Weapons" to include "Toxic Chemicals and their precursors, except where intended for purposes not prohibited under this Convention," Convention Art. II.1(a); (Pet. App. 149), and also defines "Toxic Chemical" as "[a]ny chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to

humans or animals." Convention Art. II.2; (Pet. App. 149-53). But relying on these definitions as a basis for the federal government's expansive interpretation of the Act is circular because the "purposes not prohibited" language brings us back to weapons of mass destruction and warfare—the purpose and context of the Convention. Private acts of criminal violence with household cleaning products are thus not within the outer reaches of the Convention's aims.

That this prohibition should not be read to cover all harmful acts to humans by use of chemicals is confirmed by the permission within the "purposes not prohibited" language for the use of toxic chemicals for military purposes not involving weapons or warfare and for non-"peaceful" use against other humans for "[l]aw enforcement including domestic riot control purposes." Convention Art. II.9(c) & (d); (Pet. App. 152-53); (U.S. Br. in Opp'n at 28-29). Given these purposes, and in this context, it is clear that a State Party actor would not violate the Convention by pouring vinegar into a gold fish bowl or by using chemicals to assault a romantic rival resulting in a slight burn. *See United States v. Stuart*, 489 U.S. 353, 365-66 (1989) ("The clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." (quotation marks and citation omitted)); Antonin Scalia & Bryan A. Garner, *Reading Law: Interpretation of Legal Texts* 217-20 (2012) (explaining that a prologue's statement of purposes

"can shed light on the meaning of the operative provisions that follow" and, in doing so, the preamble may determine "which *permissible* meanings of the enactment should be preferred.").

It follows that the United States was not obligated to legislate against the conduct in question. While, "[e]ach State Party" was obligated "in accordance with its constitutional processes, [to] adopt the necessary measures to implement its obligations under this Convention," Convention Art. VII.1, the United States was only obligated to "[p]rohibit natural and legal persons anywhere on its territory," and its citizens anywhere, from undertaking any action which would be a violation of the treaty if undertaken by a State Party, e.g., private terrorist activity. *See* Convention Art. VII.1(a)-(c); (Pet. App. 160). As a consequence of this, even assuming that *Holland*, as interpreted by the federal government in this litigation, was rightly decided, 18 U.S.C. § 229 would not be a statute "that implements a valid treaty" to the extent it reaches Petitioner's conduct. *Bond*, 681 F.3d at 151. This is so because the conduct here was outside the scope and intendment of the Convention and, thus, the prohibitions of the Act, as the federal government has interpreted it here, fall outside the international obligations undertaken pursuant to the Convention.

This conclusion is reinforced by the "constitutional processes" language in the Treaty. Convention Art. VII.1; (Pet. App. 160). Those constitutional processes include the canon of construction that "the language

of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them." *Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938) (collecting cases); *accord United States v. Pink*, 315 U.S. 203, 230 (1942) ("It is, of course, true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy."); *cf. Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419-21 (2003) (holding that a "clear conflict" between the United States' "express" international obligations and state law must exist, especially in areas of traditional state concern, for the latter to be required to give way). In short, if *Holland* is good law, then the Convention, and the implementing Act, must not be interpreted to grant Congress the broad police power the federal government claims.

II. *Holland* Is No Longer Good Law Because It Does Not Reflect Subsequent Doctrinal Development With Respect to the Proper Prong of the Necessary and Proper Clause.

There once was a day when this Court could simply reflect: "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument." *The Cherokee Tobacco*, 78 U.S. (11 Wall.) 616, 620 (1871). But, in view of the federal government's position in this case,

see (U.S. Br. in Opp'n at 23-25), that day has passed, and it is once again necessary to "recur[] to fundamental principles." Va. Declaration of Rights, § 15 (1776); *see* 1 A.E. Howard, *Commentaries on the Constitution of Virginia* 38-43, 281-84 n.4 (1974). It is now necessary for this Court to confirm that any federal law that arrogates to Congress a police power reserved to the States, in the guise of executing a treaty that does not obligate it to pass such domestic legislation, is not a "proper" law within Congress' power to enact.

"Under our Constitution, the Federal Government is one of enumerated powers," the States and People retaining the remainder. *City of Boerne v. Flores*, 521 U.S. 507, 516 (1997); *compare* U.S. Const. art. I, § 8, *with* U.S. Const. amend. X. As a matter of law and logic, this "enumeration presupposes something not enumerated." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824); *accord Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2577 (2012) (Roberts, C.J.) ("The Constitution's express conferral of some powers makes clear that it does not grant others."); *Lopez*, 514 U.S. at 567-68 (same).

Among those "'numerous and indefinite'" powers reserved to the States, *see Lopez*, 514 U.S. at 552 (quoting The Federalist No. 45, at 293 (C. Rossiter ed., 1961) (Madison)), is the "primary authority for defining and enforcing the criminal law," *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quotation marks and citation omitted). "Indeed, we can think of no better example of the police power, which the

Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *Morrison*, 529 U.S. at 618. Accordingly, this Court "'*always* ha[s] rejected readings of the . . . scope of federal power that would permit Congress to exercise a police power.'" *Id.* at 618-19 (quoting *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring)).

Constitutional limits on the Treaty Power, including Structural Federalism limits, have long been recognized, both before and after Justice Holmes' decision in *Holland*. *See Reid*, 354 U.S. at 16-17 (plurality opinion) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("The treaty power . . . is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States.").

The notion that Congress' legislative power may be supplemented by mere agreement with a foreign power thus not only does violence to the text and logic of our Constitution, but is contrary to this Court's federalism jurisprudence. If *Holland* means what the federal government in this case claims, Congress could acquire via this supposedly unlimited Treaty Power the authority to regulate the possession of firearms in school zones, *see Lopez*, 514 U.S. at 567,

or to prohibit "gender-motivated crimes of violence," *see Morrison*, 529 U.S. at 613, 617-18, by simply passing the measure after the President and the Senate had obtained an agreement to that effect with another nation. *See also* Nicholas Quinn Rosenkranz, *Executing the Treaty Power*, 118 Harv. L. Rev. 1867, 1871 (2005) (noting that some scholars have contended "that the treaty power may be used to evade the limits that the Supreme Court has marked on the legislative power of Congress.") (hereinafter, Rosenkranz, *Executing the Treaty Power*). The Treaty Power thus becomes the key to plenary federal power and repudiation of Our Federalism. *Id.* at 1893-94 (suggesting that this interpretation of *Holland* would permit the federal government of the "United States . . . , ostensibly to foster better relations with another country, [to] exchange reciprocal promises to regulate the citizenry so as to maximize the collective welfare—thus conferring on Congress plenary legislative power").

The decision of the Third Circuit should be reversed on the ground that it is not proper to enact a measure that goes beyond the United States' international obligations to disrupt "'the delicate balance' the Constitution strikes between state and federal power." *New York v. United States*, 505 U.S. 144, 159 (1992) (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). Although Judge Ambro in his concurrence below did not directly advert to the problem that *Holland* conflicts with the subsequent doctrinal development of the Necessary and Proper Clause in support of Structural Federalism, he did

"write separately to urge the Supreme Court to provide a clarifying explanation of its statement in *Missouri v. Holland* that '[i]f [a] treaty is valid there can be no dispute about the validity of the statute [implementing that treaty] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government.'" *Bond*, 681 F.3d at 169 (quoting *Holland*, 252 U.S. at 432). The necessity for clarification arises from this circumstance: "Absent that undertaking, a blank check exists to enact any laws that are rationally related to a valid treaty and that do not transgress affirmative constitutional restrictions like the First Amendment." *Id.* at 170. This implication, of course, negates Structural Federalism. As Judge Ambro observed: "This acquirable police power . . . can run counter to the fundamental principle that the Constitution delegates powers to the Federal Government that are 'few and well defined' while the States retain powers that are 'numerous and indefinite.' The Federalist No. 45 (James Madison)." *Id.*

To make matters worse, *Holland* unclarified invites the conclusion reached below—that the core traditional state authority to define its criminal code under the police power can be displaced by the federal government at will. Judge Ambro expressed this view of that problem:

> Since *Holland*, Congress has largely resisted testing the outer bounds of its treaty-implementing authority. But if ever there were a statute that did test those

> limits, it would be Section 229. With its shockingly broad definitions, Section 229 federalizes purely local, run-of-the-mill criminal conduct. The statute is a troublesome example of the Federal Government's appetite for criminal lawmaking. Sweeping statutes like Section 229 are in deep tension with an important structural feature of our Government: The States possess primary authority for defining and enforcing the criminal law.

Id. (internal citation, footnote, and quotation marks omitted).

The appropriate materials for the necessary clarification of *Holland* lie ready to hand in the decisions of this Court holding that acts of Congress that defeat Federalism are not proper laws under the Necessary and Proper Clause. For example, in 1997 the Court wrote this:

> When a Law . . . for carrying into Execution the Commerce Clause violates the principle of State sovereignty reflected in the various constitutional provisions . . . , it is not a Law . . . *proper* for carrying into Execution the Commerce Clause, and is thus, in the words of The Federalist, merely [an] act of usurpation which deserves to be treated as such.

Printz v. United States, 521 U.S. 898, 923-24 (1997) (emphasis in original) (quotation marks and citation omitted). The "various constitutional provisions" referred to by the Court in *Printz* are those that

underlie Structural Federalism, including the limitation of federal power to enumerated, delegated powers. Hence, any application of the Necessary and Proper Clause that renders the concept of enumerated powers superfluous, and that is tantamount to the creation of a national police power, fails under the Proper prong of the Necessary and Proper Clause. *See Morrison*, 529 U.S. at 618-19 ("'We *always* have rejected readings of the . . . scope of federal power that would permit Congress to exercise a police power.'" (quoting *Lopez*, 514 U.S. at 584-85 (Thomas, J., concurring))).

This Court repeated the *Printz* limitation—that the Necessary and Proper Clause is limited by general principles of Federalism independent of any direct textual prohibition—in *Alden v. Maine*, 527 U.S. 706, 732-33 (1999) ("When a 'Law . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions . . . it is not a 'Law . . . *proper* for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] act of usurpation' which 'deserves to be treated as such.'" (quoting *Printz*, 521 U.S. at 923-24 (quoting The Federalist No. 33, at 204 (C. Rossiter ed., 1961) (A. Hamilton)). And this limiting principle was most recently reaffirmed by a majority of the members of this Court in *National Federation of Independent Business*, 132 S. Ct. at 2592 (Roberts, C.J.) ("[W]e have also carried out our responsibility to declare unconstitutional those laws

that undermine the structure of government established by the Constitution. Such laws, which are not 'consist[ent] with the letter and spirit of the constitution,' are not '*proper* [means] for carrying into execution' Congress's enumerated powers. Rather, they are, 'in the words of The Federalist,' merely acts of usurpation' which 'deserve to be treated as such.'" (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) and *Printz*, 521 U.S. at 924); *id.* at 2643 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting) ("What is absolutely clear, affirmed by the text of the 1789 Constitution, by the Tenth Amendment ratified in 1791, and by innumerable cases of ours in the 220 years since, is that there are structural limits upon Federal power—upon what it can prescribe with respect to private conduct.").

It remains true that Congress may as a general matter execute a non-self-executing treaty by resorting to the Necessary and Proper Clause in conjunction with its other enumerated powers. *See, e.g.*, *Neely*, 180 U.S. 109. But this is true only so far as the scope of the law executing the treaty is proper. *See Reid*, 354 U.S. at 16 (plurality opinion) ("[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."); *Geofroy*, 133 U.S. at 267 ("It would not be contended that [the Treaty Power] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States. . . ."). And a claimed power to

oust the general criminal laws of the States in the way done here is not proper and thus not constitutional.

As a consequence, the problem in this case is not what the Third Circuit thought it was—"a questionable exercise of prosecutorial discretion." *Bond*, 681 F.3d at 165. Instead, the problem is that Congress in this case is attempting to execute the "Power . . . to make treaties" through legislation whose scope is not proper under the Necessary and Proper Clause. This Court should make clear that *Holland* does not stand as a yawning exception to the principles so clearly stated by this Court in *Printz* and *Alden* and that were most recently reaffirmed in the healthcare case.

III. The Broadly Stated Rule in *Holland* Is Also Inconsistent With the Constitution's Text and Structure.

The Necessary and Proper Clause grants to Congress the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" both the powers granted in Article I of the Constitution "and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const. art. I, § 8, cl. 18. As a textual matter, the Necessary and Proper Clause conjoins with the Treaty Power of Article II, § 2 to grant to Congress the power to enact such laws as are necessary and proper "'for carrying

into Execution . . . [the] Power . . . to make Treaties.'" This does not textually include the domestic implementation of treaties already made. Domestic implementation of non-self-executing treaties must depend upon another enumerated power. *See* Rosenkranz, *Executing the Treaty Power* at 1882-89.

In sum, the Necessary and Proper Clause, while providing the only nexus between treaties and Congress as a whole, does not textually grant Congress any plenary power to declare whatever treaty the President, with the Senate's consent, "make[s]" with a foreign potentate, domestic law. *See* Rosenkranz, *Executing the Treaty Power* at 1892-1912 (cataloguing the ways in which the view that the President and Senate's exercise of the Treaty Power under Article II may expand Congress' power under Article I "runs counter to the textual and structural logic of the Constitution."). Congress' "legislative power" to implement international obligations instead flows solely from its enumerated powers. *See* U.S. Const. art. I, § 1. In accord with the Constitution's text and structure, this Court should reaffirm the fundamental principle that there are absolute limits on Congress' authority even when exercised in conjunction with the Treaty Power. *See Morrison*, 529 U.S. at 616 ("Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.").

CONCLUSION

For all of the reasons stated above, the decision of the Third Circuit should be reversed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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CAROL ANNE BOND,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF THE YALE LAW SCHOOL CENTER FOR GLOBAL LEGAL CHALLENGES *AS AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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Clark v. *Allen*, 331 U.S. 503 (1947).....26

De Geofroy v. *Riggs*, 133 U.S. 258 (1890).....18

El Al Israel Airlines v. *Tsui Yuan Tseng*, 525 U.S. 155 (1999).....27

Hauenstein v. *Lynham*, 100 U.S. 438 (1880).....15, 17

Jordan v. *K. Tashiro*, 278 U.S. 123 (1928).....17

M'Culloch v. *Maryland*, 17 U.S. 316 (1819).....23

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Missouri v. *Holland*, 252 U.S. 416 (1920).....17, 18, 19, 22, 28

Neely v. *Henkel*, 180 U.S. 109 (1901).....23

Nielsen v. *Johnson*, 279 U.S. 47 (1929).....17, 27

Orr v. *Hodgson*, 17 U.S. 453 (1819).....26

Reid v. *Covert*, 354 U.S. 1 (1957).....19

Santovincenzo v. *Egan*, 284 U.S. 30 (1931).....26

Soc'y for the Propagation of the Gospel in Foreign Parts v. *New Haven*, 21 U.S. 464 (1823).....26

United States v. *Belmont*, 301 U.S. 324 (1937)....14, 15

United States v. *Pink*, 315 U.S. 203 (1942).....14

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U.S. Steel Corp. v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978) 6

Ware v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796) 25, 26

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U.S. Const. Art. I, § 5, Cl. 2 29

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U.S. Const. Art. I, § 10, Cl. 1 15

U.S. Const. Art. I, § 10, Cl. 3 15

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U.S. Const. Art. III, § 2 ..... 3, 21

U.S. Const. Art. IV, § 1 10

U.S. Const. Art. IV, § 3, Cl. 2 10

U.S. Const. Art. VI, Cl. 2 ..... 3, 20, 21

U.S. Const. Amend. X 16, 17, 19

TREATIES

Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 54 33

Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20 33

TABLE OF AUTHORITIES – Continued

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Treaty of Paris, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80. 5

OTHER AUTHORITIES

Advisory Comm. on Int'l Law, *Memorandum Summarizing U.S. Views and Practice in Addressing Federalism Issues in Treaties*, U.S. Dep't of State (Nov. 8, 2002), http://www.state.gov/s/l/38637.htm 33

Akhil Reed Amar, *America's Constitution: A Biography* (2005).....5, 6

Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445 (2011). 5

Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. Pa. L. Rev. 399 (2000).....32

David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000).....18

Alexander Hamilton, *The Defence No. XXXVI*, reprinted in 20 *The Papers of Alexander Hamilton* 3 (Harold C. Syrett ed., Univ. of Va. Press 2011) (1796).....18, 19

Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 Yale L.J. 140 (2009). 31, 33

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Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236 (2008) 29, 30, 31

Oona A. Hathaway & Scott Shapiro, *The Law of the World* (Apr. 23, 2013) (unpublished manuscript), available at http://www.law.yale.edu/documents/pdf/cglc/HathawayShapiro_LOW.pdf 7

Oona A. Hathaway, Spencer Amdur, Celia Choy, Samir Deger-Sen, John Paredes, Sally Pei & Haley Nix Proctor, *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239 (2013) 4

Louis Henkin, *Foreign Affairs and the United States Constitution* (2d ed. 1996) 17

Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. Cal. L. Rev. 1327 (2006) 34

Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 Mo. L. Rev. 1063 (2008) 34

Letter from John Adams to John Jay (May 25, 1786), in 8 *The Works of John Adams* 394 (Charles Francis Adams ed. 1853) 5

Library of Cong., *THOMAS: Treaties*, http://thomas.loc.gov/home/treaties/treaties.html (last visited Aug. 14, 2013) 30

TABLE OF AUTHORITIES – Continued

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8 Op. Att'y Gen. 411, 415 (1857) 15

Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373 (2012) 6

Restatement (Third) of the Foreign Relations Law of the United States (1987).....18, 27

The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787 (Jonathan Elliot ed., William S. Hein & Co. 2d ed. 1996) (1891).....11, 12, 13, 28

The Federalist No. 3 (John Jay).....8, 21, 22

The Federalist No. 22 (Alexander Hamilton).....2, 8

The Federalist No. 44 (James Madison).....21

The Federalist No. 80 (Alexander Hamilton).....9

The Records of the Federal Convention of 1787 (Max Farrand ed. 1911) .....*passim*

U.S. Senate, *Treaties Approved by the Senate During the Current Congress*, http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/trty_rtf.htm 30

Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 Cornell L. Rev. 892 (2004).....27

Emmerich de Vattel, *The Law of Nations* (Joseph Chitty ed. and trans., T. & J.W. Johnson & Co. 1844) (1758).....7

INTEREST OF THE *AMICUS CURIAE*

The Yale Law School Center for Global Legal Challenges is an independent Center that promotes the understanding of international law, national security law, and foreign relations law. The Center seeks to close the divide between the legal academy and legal practice by connecting the legal academy to U.S. government actors responsible for addressing international legal challenges. In the process, the Center aims to promote greater understanding of legal issues of global importance – encouraging the legal academy to better grasp the real legal challenges faced by U.S. government actors and encouraging those same government actors to draw upon the expertise available within the legal academy. The Center files this brief to promote accurate interpretation of U.S. foreign relations law in this case.[1]

SUMMARY OF ARGUMENT

At the time of the Founding, the nation's survival hinged on its ability to fulfill its treaty obligations in the face of recalcitrant States. As Alexander Hamilton

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties' correspondence consenting to the filing of this brief has been filed with the Clerk's office. The views expressed in this brief are not necessarily those of the Yale Law School or Yale University.

observed, the Articles of Confederation left the "faith, the reputation, [and] the peace of the whole Union * * * at the mercy of the prejudices, the passions, and the interests of every member of which it is composed." *The Federalist No. 22* (Alexander Hamilton).

The Framers recognized that the exigencies of diplomacy demanded a robust, flexible treaty power. To achieve this aim, they delegated to the federal government an independent enumerated Article II Treaty Power, the scope of which is defined on its own terms and not by Article I. The Framers considered proposals to qualify the Treaty Power, but ultimately rejected them all. They also explicitly denied the States the power to make international agreements. Thus, in contrast to the legislative powers, which were carefully divided between Congress and the States, the Treaty Power was delegated in its entirety to the federal government, empowering the President and Senate to make treaties on any subject over which sovereign nations might validly negotiate.

The Framers knew that it was not enough to give the new federal government a robust treaty power. They also had to effectuate that power by giving the federal government the authority to implement and enforce the treaties it entered. They took three steps to ensure the Constitution did not repeat the Articles' mistakes.

First, the Supremacy Clause makes treaties the "supreme Law of the Land." U.S. Const. Art. VI, Cl. 2. Second, the judicial power extends to "all Cases * * * arising under * * * Treaties made, or which shall be made," thus requiring the courts to enforce treaty obligations. *Id.* Art. III, § 2. And, third, Congress has the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States*, or in any Department or Officer thereof." *Id.* Art. I, § 8, Cl. 18 (emphasis added).

The Framers intended these provisions to protect the United States from the dangerous failures to abide by treaty obligations that had plagued the country under the previous regime.

Recognizing that the Treaty Power was expansive, the Framers did not leave it unconstrained. They put in place significant structural checks – requiring that every treaty gain the support of the President *and* a two-thirds supermajority of the Senate. In doing so, they granted each State, no matter how small, significant power over the treaty-making process.

The Framers considered this the most effective way to safeguard the States against federal interference. History has vindicated their decision. The number of Article II treaties ratified each year has

remained consistently low since the Founding. And what treaties *are* ratified frequently include specific provisions meant to safeguard state prerogatives.

In sum, the structural checks embodied in the Treaty Clause have proven extremely effective in protecting federalism values. Judicial intervention for that purpose is unnecessary and ill-advised.[2]

ARGUMENT

I. AT THE CONSTITUTIONAL CONVENTION, THE FRAMERS SOUGHT TO REPAIR THE ARTICLES OF CONFEDERATION, WHICH HAD ALLOWED INDIVIDUAL STATES TO PLACE THE ENTIRE COUNTRY IN VIOLATION OF ITS TREATY OBLIGATIONS.

Under the Articles of Confederation, the federal government was unable to secure state compliance with treaty obligations. This placed the very existence of the new nation at risk. When they convened in Philadelphia, the Framers worked in the shadow of these threats. They were therefore determined to design a new treaty power that would not enable

[2] This brief draws in significant part on Oona A. Hathaway, Spencer Amdur, Celia Choy, Samir Deger-Sen, John Paredes, Sally Pei & Haley Nix Proctor, *The Treaty Power: Its History, Scope, and Limits*, 98 Cornell L. Rev. 239 (2013).

individual States to place the security of the United States in jeopardy.

The 1783 Treaty of Paris had brought an end to the war with Great Britain. In the treaty, Great Britain acknowledged the United States to be free, sovereign, and independent. It relinquished all claims to the government and territorial rights of the United States and every part thereof. And it recognized the territorial boundaries between the United States and British North America. Both countries guaranteed that lawful contracted debts would be paid to creditors on both sides. Treaty of Paris, U.S.-Gr. Brit., Sept. 3, 1783, 8 Stat. 80.

Under the Articles of Confederation, however, the United States found it difficult to fulfill its end of the bargain. During the Revolutionary War, several States had passed laws preventing British creditors from collecting their debts. These state laws obstructed U.S. compliance with the 1783 Treaty. The national government was powerless to prevent the States' obstruction of treaty compliance. See Akhil Reed Amar, *America's Constitution: A Biography* 47 (2005); Anthony J. Bellia, Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 498-501 (2011).

In retaliation for the United States' failure to comply, Britain refused to evacuate strategically important forts in the northern frontier, effectively threatening renewal of hostilities. See *Letter from John Adams to John Jay* (May 25, 1786), in 8 *The*

Works of John Adams 394 (Charles Francis Adams ed. 1853) ("By the answer of Lord Carmarthen to the memorial of the 30th of November, congress will see that the detention of the posts is attempted to be justified by the laws of certain States impeding the course of law for the recovery of old debts * * *."). Violation of the Treaty of Paris by some States "put sister [S]tates at risk by giving Britain a pretext for further North American interventions." Amar, *supra*, at 47.

The threat of renewed conflict was not mere speculation. At the time of the Founding – as the Constitution's drafters well understood – violations of treaty obligations provided just cause for war under international law. The principle of treaty breach as *casus belli* was prominently highlighted by Emmerich de Vattel, "[t]he international jurist most widely cited in the first 50 years after the Revolution." *U.S. Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452, 462 n.12 (1978).[3]

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[3] The Framers knew Vattel so well that "[i]n 1775, Benjamin Franklin acknowledged receipt of three copies of a new edition, in French, of Vattel's Law of Nations and remarked that the book 'has been continually in the hands of the members of our Congress now sitting.'" *U.S. Steel Corp.*, 434 U.S. at 462 n.12 (quoting 2 Francis Wharton, *United States Revolutionary Diplomatic Correspondence* 64 (Washington, Gov't Printing Office 1889)). See also Robert J. Reinstein, *Executive Power and the Law of Nations in the Washington Administration*, 46 U. Rich. L. Rev. 373, 404-405 (2012) (describing the influence of Vattel on Hamilton and Jefferson).

Vattel recognized that "[t]he violation of a treaty is an act of injustice." 2 Emmerich de Vattel, *The Law of Nations* § 164 (Joseph Chitty ed. and trans., T. & J.W. Johnson & Co. 1844) (1758). "As the engagements of a treaty impose on the one hand a perfect obligation, they produce on the other a perfect right. The breach of a treaty is therefore a violation of the party with whom [a State has] contracted; and this is an act of injustice against him." *Ibid.* "The right of employing force, or making war, belongs to nations no farther than is necessary for their own defence, and for the maintenance of their rights," and "[w]hatever strikes at these [perfect] rights is an injury, and a just cause of war." 3 Vattel, *supra*, § 26.

Such wars were entirely commonplace for hundreds of years preceding the Constitutional Convention. Any treaty violation, no matter how trivial, gave a state "just cause" to go to war. See generally Oona A. Hathaway & Scott Shapiro, *The Law of the World* (Apr. 23, 2013) (unpublished manuscript), available at http://www.law.yale.edu/documents/pdf/cglc/HathawayShapiro_LOW.pdf (describing how international law long permitted States to resort to war in pursuit of "just causes," including even trivial treaty violations).

The Framers repeatedly referred to this principle while drafting and debating the Constitution. For example, John Jay observed that "[t]he number of wars which have happened or will happen in the world will always be found to be in proportion to the number and weight of the causes, whether REAL or PRETENDED, which PROVOKE or INVITE them."

The Federalist No. 3 (John Jay). He concluded that "[t]he JUST causes of war, for the most part, arise either from *violations of treaties* or from direct violence." *Ibid.* (emphasis added).

The Articles thus put the entire nation at risk by permitting individual States to cause breaches of the country's treaty obligations. As Alexander Hamilton explained,

> The treaties of the United States, under the present Constitution [of the Confederation], are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions, and the interests of every member of which it is composed.

The Federalist No. 22 (Alexander Hamilton). "Is it possible," he asked rhetorically, "that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, [and] their safety, on so precarious a foundation?" *Ibid.*

What the country needed was an *effective* federal treaty power: that is, the power both to make and to carry out treaty obligations. Without such a power, individual States would always be able to undermine the entire nation's foreign relations and, thereby, its security. As Hamilton put it, "[T]he peace of the WHOLE ought not to be left at the disposal of a

PART. The Union will undoubtedly be answerable to foreign powers for the conduct of its members. And the responsibility for an injury ought ever to be accompanied with the faculty of preventing it." *The Federalist No. 80* (Alexander Hamilton).

James Madison made the point even more forcefully at the Philadelphia Convention, asking of a proposal: "Will it prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars?" 1 *The Records of the Federal Convention of 1787*, at 316 (Max Farrand ed. 1911) [hereinafter *Records*]. He reminded the Convention's delegates that individual States had violated treaties before:

> The tendency of the States to these violations has been manifested in sundry instances. The files of Congs. contain complaints already, from almost every nation with which treaties have been formed. * * * A rupture with other powers is among the greatest of national calamities. It ought therefore to be effectually provided that no part of a nation shall have it in its power to bring them on the whole. The existing confederacy does (not) sufficiently provide against this evil.

Ibid.

When the Framers wrote the Treaty Clause, there is no doubt that they were focused on the relationship between the federal government and the States. They were determined to create a new treaty power that would prevent individual States from

violating treaties and thereby placing the security of the entire nation in jeopardy. They aimed, in short, to ensure that the United States would have the power to live up to its treaty commitments.

II. THE FRAMERS CREATED A ROBUST, FLEXIBLE, AND EXCLUSIVELY FEDERAL TREATY POWER.

A. The Framers Gave the Federal Government a Robust and Flexible Treaty Power, Which They Understood To Be an Enumerated Power Independent of Congress's Article I Authority.

The Treaty Clause creates an independent enumerated power. As such, the Treaty Power is not limited to the scope of the powers enumerated in Article I. This is simply a specific instance of a general principle: Enumerated powers in different parts of the Constitution do not restrict each other's scope. When Congress "by general Laws prescribe[s] the" manner of proof and effect of out-of-state judgments, U.S. Const. Art. IV, § 1, or when it makes "Rules and Regulations respecting the Territory or other Property belonging to the United States," *id.* Art. IV, § 3, Cl. 2, it is not constrained by the scope of the Commerce Clause or of other Article I powers. Like all independently enumerated powers, the Treaty Power must be examined on the basis of its own text, structure, and historical context.

The Framers recognized that the exigencies of international relations demanded a robust and flexible

treaty power capable of addressing issues traditionally governed by state law. This is reflected in the text of the Treaty Clause, which grants the Treaty Power to the federal government in its entirety without qualification. Article II of the Constitution simply gives the President the "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur." *Id.* Art. II, § 2, Cl. 2.

The structure of the Treaty Power reinforces the text. The power is placed in Article II, rather than Article I. Moreover, the power is subject to its own stringent *procedural* checks. Most notably, two-thirds of all Senators – the representatives of the States – must approve all treaties. See Part IV, *infra*.

These textual and structural choices did not arise by chance. The history of the Treaty Clause shows that the Framers specifically considered the concerns of those wary of an unqualified treaty power – concerns identical to the ones the Petitioner raises now. Indeed, the requirement that a treaty gain the support of two-thirds of the Senate was specifically offered and adopted as a substitute for the various subject-matter limitations critics unsuccessfully proffered. See, *e.g.*, 3 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787*, at 347-348, 357-359, 362-365, 500 (Jonathan Elliot ed., William S. Hein & Co. 2d ed. 1996) (1891) [hereinafter *Debates*].

Opponents of the Treaty Clause's text persistently objected to the absence of any limits on the subjects to which the Treaty Power could apply. At the Philadelphia Convention, future Supreme Court Justice James Wilson warned that "the Senate alone can make a Treaty, requiring all the Rice of S. Carolina to be sent to some one particular port." 2 *Records*, *supra*, at 393. George Mason worried that the Senate "could * * * sell the whole Country by means of Treaties," *id.* at 297, and – during the Virginia Convention – confirmed his understanding that, unless there was a substantive limit written into the Clause, treaties could be used to "dismember the empire." 3 *Debates*, *supra*, at 509. Indeed, he continued, "[t]he President and the Senate [could] make any treaty whatsoever." *Ibid.* And Patrick Henry railed against "the paramount power given them." *Id.* at 513.

The Framers nevertheless rebuffed proposals that would have qualified the Treaty Power. In so doing, they made clear that they did not want to limit the federal government's sovereign power to conduct foreign relations; instead, they wanted to give it the flexibility required to adapt to changing times. As Edmund Randolph noted at the Virginia Convention, "[t]he various contingencies which may form the object of treaties, are, in the nature of things, incapable of definition." *Id.* at 363. He acknowledged that the Treaty Power lacked any express substantive limits, but he concluded: "I defy the wisdom of [those opposed] * * * to show how [it] ought to be limited." *Id.* at 504.

But it was James Madison who put the nail in the coffin:

> I do not think it possible to enumerate all the cases in which such external regulations would be necessary. Would it be right to define all the cases in which Congress could exercise this authority? The definition might, and probably would, be defective. They might be restrained, by such a definition, from exercising the authority where it would be essential to the interest and safety of the community.

Id. at 514-515.[4]

In sum, the text, structure, and ratification history of the Treaty Clause rule out the possibility of any Article I limit – whether express or implied – on the Treaty Power.

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[4] Madison identified only one limit on the content of treaties: they could not "alienate any great, essential right." 3 *Debates*, *supra*, at 514. See also Part II.C, *infra* (detailing how explicit prohibitions found elsewhere in the Constitution limit the scope of the treaty power).

B. The Constitution Not Only Grants the Power To Make and Enforce Treaties to the Federal Government but Also Explicitly Denies That Power to the States.

This Court has repeatedly reaffirmed that federal authority must be paramount in our foreign relations. Indeed, the demands of state sovereignty are at their weakest when it comes to formulating and executing foreign policy. In *United States* v. *Pink*, the Court stated that

> there are limitations on the sovereignty of the States. No State can rewrite our foreign policy to conform to its own domestic policies. Power over external affairs is not shared by the States; it is vested in the national government exclusively. It need not be so exercised as to conform to state laws or state policies whether they be expressed in constitutions, statutes, or judicial decrees. And the policies of the States become wholly irrelevant to judicial inquiry, when the United States, acting within its constitutional sphere, seeks enforcement of its foreign policy in the courts.

315 U.S. 203, 233-234 (1942). To reach this conclusion, the *Pink* Court relied on *United States* v. *Belmont*, which held that, "[i]n respect of all international negotiations and compacts, and in respect of our foreign relations generally, state lines disappear. * * * Within the field of its powers, whatever the United States rightfully undertakes, it

necessarily has warrant to consummate." 301 U.S. 324, 331-332 (1937).

The Constitution does not just vest the entire Treaty Power in the federal government. It also prohibits States from participation in foreign agreements not once but twice. U.S. Const. Art. I, § 10, Cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation * * *."); *id.* Art. I, § 10, Cl. 3 ("No State shall, without the Consent of Congress, * * * enter into any Agreement or Compact with another State, or with a foreign Power * * *.").

Citing these Clauses, this Court has repeatedly confirmed that the Treaty Power is exclusively federal. See *Belmont*, 301 U.S. at 330 ("Governmental power over internal affairs is distributed between the national government and the several States. Governmental power over external affairs is not distributed, but is vested exclusively in the national government."); *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243, 249 (1833) ("A state is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power, which is conferred entirely on the general government * * *."). And because the Treaty Power is exclusively federal, the *entire* treaty power of the United States necessarily resides in the federal government. Indeed, this Court has long recognized that "[i]f the national government has not the power to do what is done by such treaties, it cannot be done at all." *Hauenstein* v. *Lynham*, 100 U.S. 438, 490 (1880). See 8 Op. Att'y Gen. 411, 415

(1857) ("[I]n the matter of foreign negotiation, the States have conferred the whole of their power, in other words, all the treaty-powers of sovereignty, on the United States. Thus, in the present case, if the power of negotiation be not in the United States, then it exists nowhere * * *.").

For these reasons, it is clear that the Constitution creates a unified treaty power and denies the States any ability to engage in foreign relations without the consent of Congress. The additional restrictions advanced by the Petitioner contradict the exclusively federal character of the Treaty Power in the text of the Constitution and in this Court's foreign affairs jurisprudence.

C. The Tenth Amendment Does Not Apply to the Treaty Power, Which Was "Delegated to the United States by the Constitution" and "Prohibited by It to the States."

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. But as explained in Sections II.A-B, *supra*, the Constitution both grants the Treaty Power to the federal government and denies it to the States. The Tenth Amendment's "reserv[ation]" therefore does not apply to the Treaty Power.

The Court has left this conclusion undisturbed in the ninety-three years since it concluded that, to challenge the validity of a treaty or its implementing legislation, "it is not enough to refer to the Tenth Amendment[.] * * * [B]y Article 2, Section 2 [of the Constitution], the power to make treaties is delegated expressly, and by Article 6 treaties made under the authority of the United States * * * are declared the supreme law of the land." *Missouri* v. *Holland*, 252 U.S. 416, 432 (1920). Nor could an "invisible radiation from the general terms of the Tenth Amendment" limit the United States' authority to regulate migratory-bird hunting. *Id.* at 434.

This Court "has consistently upheld the validity and supremacy of treaty provisions dealing with matters as local as the right to inherit land or to engage in local trade." Louis Henkin, *Foreign Affairs and the United States Constitution* 191 (2d ed. 1996); see, *e.g.*, *Nielsen* v. *Johnson*, 279 U.S. 47 (1929) (recognizing the validity of a treaty with Denmark and its supremacy over a contradictory state inheritance tax provision); *Jordan* v. *K. Tashiro*, 278 U.S. 123 (1928) (recognizing the validity of a treaty with Japan and its supremacy over a contradictory state business incorporation restriction); *Asakura* v. *Seattle*, 265 U.S. 332 (1924) (recognizing the validity of a treaty with Japan and its supremacy over a contradictory city business licensure ordinance); *Hauenstein*, 100 U.S. 483 (recognizing the validity of a treaty with Switzerland and its supremacy over a contradictory state law on land inheritance).

That the Treaty Power is delegated to the federal government does not leave it unchecked. In addition to the procedural checks detailed in Part IV, *infra*, a treaty may not "contravene any prohibitory words to be found in the Constitution." *Holland*, 252 U.S. at 433; see also Restatement (Third) of the Foreign Relations Law of the United States § 302 cmt. b & reporter's note 1 (1987); David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075, 1083-1084 (2000).

Thus, it is hornbook law that the federal government may not employ a treaty to "authorize what the [C]onstitution forbids." *De Geofroy* v. *Riggs*, 133 U.S. 258, 267 (1890). It may not, for example, employ a treaty to grant a title of nobility or to pass an ex post facto law – or indeed, to carry out any of the prohibited actions listed in Article I, § 9. U.S. Const. Art. I, § 9. Nor may the federal government employ a treaty to cause a "change in the character of the government." *De Geofroy*, 133 U.S. at 267. It may not use a treaty, for example, to transfer the Constitutional powers of one branch of the federal government to another. See Alexander Hamilton, *The Defence No. XXXVI*, reprinted in 20 *The Papers of Alexander Hamilton* 3, 6-7 (Harold C. Syrett ed., Univ. of Va. Press 2011) (1796) (explaining that "[t]he only constitutional exception to the power of making Treaties is that it shall not change the constitution" because "a delegated authority cannot rightfully transcend the constituting act unless so expressly authorized by the constituting Power. A treaty for example cannot

transfer the legislative power to the Executive Department") (footnotes omitted).

The Tenth Amendment is nothing like these explicit Constitutional prohibitions. Indeed, the fact that a treaty may not contravene the Constitution, and may not cause a "change in the character of the government," *ibid.*, is fully consistent with *Holland*'s "careful[ ]" analysis holding that the Migratory Birds Treaty was "not inconsistent with any specific provision of the Constitution." *Reid* v. *Covert*, 354 U.S. 1, 18 (1957) (plurality opinion).

This is because a treaty that violates affirmative prohibitions found in the Constitution is not a valid treaty. (For example, a treaty provision that granted a title of nobility would be *an invalid treaty commitment*.) But "[t]o the extent that the United States can validly make treaties, the people and the States have delegated their power to the National Government[,] and the Tenth Amendment is no barrier." *Ibid.*

III. THE FRAMERS TOOK STEPS TO ENSURE THAT THE NEW TREATY POWER WOULD BE IMPLEMENTED AND ENFORCED, EVEN IN THE FACE OF STATE RESISTANCE.

The Framers recognized that it was not enough to give the new federal government a robust and flexible treaty power. It was also essential to give the federal government the authority to implement and enforce the treaties it entered. Recognizing this clear

Constitutional design, this Court has consistently upheld the federal government's power to enforce any treaty it ratifies.

A. The Framers Took Steps To Ensure the Federal Government Would Be Empowered To Enforce the Nation's Treaty Obligations.

The Framers recognized the threat to the nation's security posed by the Articles of Confederation's dangerous combination of a broad treaty-making authority with a weak power to enforce those same treaties. To ensure the new Constitution would not create this same danger, the Framers took three steps to ensure that the federal government would be empowered to enforce the nation's treaty obligations even on matters traditionally within the ambit of state authority.

First, the Framers made clear in the Supremacy Clause that

> all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. Art. VI, Cl. 2.

Writing in support of the Supremacy Clause, Madison pointed out the vital importance of securing

uniform compliance. He contended that, in the absence of the Supremacy Clause, "it might happen that a treaty * * * of great and equal importance to the States, would interfere with some and not with other [State] constitutions, and would consequentially be valid in some of the States at the same time that it would have no effect in others." *The Federalist No. 44* (James Madison). If that were to happen, "the world would have seen * * * the authority of the whole society every where subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members." *Ibid.*

Second, the Framers vested judicial authority for the enforcement of treaties in the federal courts: "The judicial Power shall extend to all Cases * * * arising under * * * Treaties made, or which shall be made * * *." U.S. Const. Art. III, § 2. This provision specifically tasked the federal courts with ensuring robust compliance with international treaties.

In the *Federalist Papers*, John Jay explained why. Invoking the country's recent experience with the Treaty of Paris, he argued that

> under the national government, treaties * * * will always be expounded in one sense and executed in the same manner, – whereas, adjudications on the same points and questions, in thirteen States * * * will not always accord or be consistent * * *. The wisdom of the convention, in committing such questions to the jurisdiction and judgment of courts

> * * * [of] one national government, cannot be too much commended.

The Federalist No. 3 (John Jay). Thus would the security of the whole be protected from the intransigence of the part.

Third, the Framers endowed Congress with the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, *and all other Powers vested by this Constitution in the Government of the United States*, or in any Department or Officer thereof." U.S. Const. Art. I, § 8, Cl. 18 (emphasis added). Those governmental powers include the federal Treaty Power. The textual link between the Necessary and Proper Clause and the Treaty Clause is clear: Article II provides that the President "shall have *Power*, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators present concur." *Id.* Art. II, § 2, Cl. 2 (emphasis added).

Where, as here, the implementing legislation is manifestly designed to ensure compliance with a valid treaty obligation, "there can be no dispute about the validity of the statute under Article 1, Section 8, as a necessary and proper means to execute the powers of the Government." *Holland*, 252 U.S. at 432. That is because "[t]he power of Congress to make all laws necessary and proper * * * includes the power to enact such legislation as is appropriate to give efficacy to any stipulations which it is competent for the President by and with the advice and consent of the

Senate to insert in a treaty with a foreign power." *Neely* v. *Henkel*, 180 U.S. 109, 121 (1901).

Reading the Necessary and Proper Clause together with the Treaty Clause establishes that Congress may pass implementing statutes "plainly adapted to th[e] end" of ensuring U.S. compliance with its obligations under a valid treaty. *M'Culloch* v. *Maryland*, 17 U.S. 316, 421 (1819).

B. The Framers Meant To Give the Federal Government the Power To Enforce *All* Its Valid Treaty Commitments.

The Framers considered it essential that the federal government be able to live up to *all* its valid treaty commitments. Of course, they generally expected treaties to be self-executing.[5] They therefore never expressly discussed how best to implement and enforce non-self-executing treaties. But the Constitution's text, structure, and history all make clear that the Framers intended the federal government to have power to effectuate *all* its valid treaty commitments.

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[5] This understanding is clear from the record of the debates at the Philadelphia Convention. One proposal would have allowed Congress "[t]o call forth the aid of the militia, in order to execute the laws of the Union [and] enforce treaties." 2 *Records*, *supra*, at 389 n.9. Gouverneur Morris moved to strike the phrase "enforce treaties," arguing it was "superfluous since treaties were to be 'laws.'" *Id.* at 389-390. His motion passed unanimously. *Id.* at 390. Morris later proposed that "no Treaty shall be binding on the U.S. which is not ratified by a law." *Id.* at 392. That proposal was rejected. *Id.* at 392-394.

First: Text. As discussed *supra* Section III.A., the Necessary and Proper Clause gives Congress the power to make all laws necessary for carrying into execution all other powers vested by the Constitution – the Treaty Power included. And the Treaty Power grants the President and the Senate the power to make all treaties on behalf of the United States, whether those treaties are self-executing or not.

Second: Structure. It would be strange indeed if the President and two-thirds of the Senate could accomplish by self-executing treaty what the President and two-thirds of the Senate *plus* both Houses of Congress and the President acting a second time could not. Petitioner is correct, of course, that the Senate may ratify a valid non-self executing treaty with the understanding that there will be no federal legislation to carry that treaty into effect. In such cases, however, the Senate is fully capable of making those intentions and expectations clear by modifying the United States' treaty obligations. See *infra* Section IV.C. It would not, moreover, vote to approve federal legislation contravening that intention.

Third: History. Non-self-executing treaties bind their signatories as a matter of international law just as strongly as their self-executing counterparts. It stands to reason, then, that the Framers would have viewed compliance with non-self-executing treaties as equally essential to the nation's security.

This analysis is fully consistent with the Court's decision in *Medellín* v. *Texas*, 552 U.S. 491 (2008),

which did not hold that treaties that *may* depend on state and local laws and authorities for compliance *must* rely only on such laws. Certainly, the Vienna Convention on Consular Relations relied on "state and local laws and authorities for compliance." Pet. Br. at 32. But this Court has never concluded that federal legislation to carry the Convention into effect would have been unconstitutional.

Quite the contrary: When this Court decided that the treaty commitments at issue were not self-executing, it made clear that Congress could have enacted legislation to effectuate those same international obligations. *Medellín*, 552 U.S. at 520. The Court explained, "Congress is up to implementing non-self executing treaties." *Id.* at 521. "Congress knows," the Court concluded, "how to accord domestic effect to international obligations when it desires such a result." *Id.* at 522. Congress simply had not done what was necessary. In the present case, however, Congress has.

C. This Court Has Consistently Upheld Treaty Obligations, Even in Areas of Traditional State Control.

The Framers' constitutional design was put to an early test in *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796). During the Revolutionary War, Virginia was among the States that enacted a statute allowing debtors who had borrowed money from British creditors to discharge the debt by paying it to the State.

After the war, a British creditor sued, arguing that the Treaty of Paris nullified Virginia's statute. This Court agreed. As Justice Chase explained, "A treaty cannot be the Supreme law of the land, that is of all the United States, if any act of a State Legislature can stand in its way." *Id.* at 236. Faced with precisely the same problem that had motivated the Constitutional Convention, the Court ensured the treaty's domestic effect, in the process superseding the law of Virginia. It did so, moreover, in an area of law that had traditionally been a matter of near exclusive state concern – property law.

The *Ware* opinion does not stand alone. Although this Court has recognized that rights of succession to property are generally matters of local law, *Clark* v. *Allen*, 331 U.S. 503, 517 (1947), it has upheld succession-related treaties despite conflicting state laws. See, *e.g.*, *Santovincenzo* v. *Egan*, 284 U.S. 30 (1931) (finding the Consular Convention of 1878 between the United States and Italy overruled New York law governing the assets of a native of Italy who died intestate in New York); *Soc'y for the Propagation of the Gospel in Foreign Parts* v. *New Haven*, 21 U.S. 464 (1823) (finding the Treaty of Paris and the Jay Treaty protected the real property of a British corporation against a confiscatory Vermont property law); *Orr* v. *Hodgson*, 17 U.S. 453, 462 (1819) (finding the Treaty of Paris protected the titles of British subjects from "forfeiture, by way of escheat for the defect of alienage," notwithstanding contrary Virginia law).

Other prominent examples of treaties relating to matters of traditional State concern include treaties that guarantee foreign citizens rights of inheritance and property ownership, such as treaties of amity, commerce, and navigation concluded in the early years of the Republic. See Michael P. Van Alstine, *Federal Common Law in an Age of Treaties*, 89 Cornell L. Rev. 892, 922 (2004) (describing a broad range of "[s]elf-executing treaties [that] now address such diverse fields as commercial law, criminal law, property law, tax law, civil procedure, administrative law, and family law"). Provisions in such treaties – "especially in matters ordinarily governed by State law" – have long been given effect by the courts without any implementing legislation. Restatement (Third) of the Foreign Relations of the United States, § 111 reporter's note 5 (1987).

The same is true for treaty provisions governing matters such as personal injury, *El Al Israel Airlines* v. *Tsui Yuan Tseng*, 525 U.S. 155 (1999) (finding that the Warsaw Convention precluded a damages action under New York tort law); intrastate trade and business regulation, *Asakura*, 265 U.S. 332 (finding that a 1911 treaty with Japan precluded operation of a Seattle ordinance prohibiting noncitizens from engaging in the pawnbroker business); and taxes, *Nielsen* v. *Johnson*, 279 U.S. 47 (1929) (finding that a treaty with Denmark required equal inheritance taxation of Danish and U.S. citizens, notwithstanding contrary Iowa law).

IV. THE TREATY POWER PROTECTS FEDERALISM THROUGH THE RATIFICATION PROCESS.

A. The Framers Established a Two-Thirds Consent Requirement in the Senate To Protect State Prerogatives.

This Court did not eliminate federalism as a check on the Treaty Power in *Holland*, because the Treaty Power contains its *own* robust federalism check. Treaty ratification requires both the consent of the President and a two-thirds supermajority vote in the Senate. U.S. Const. Art. II, § 2, Cl. 2. The Constitution thus grants the States, through their representatives in the Senate, the power to exercise control over treaty ratification.

By requiring that all treaties receive the advice and consent of the Senate, the Framers knew they were conferring gate-keeping authority to the States equally represented therein. In debates over the Treaty Clause, James Madison observed that "the Senate represented the States alone." 2 *Records*, *supra*, at 392. Alexander Hamilton reasoned that "the senators will constantly be attended with a reflection[ ] that their future existence is absolutely in the power of the States. Will not this form a powerful check?" 2 *Debates*, *supra*, at 304. And North Carolina Convention delegate William R. Davie argued that "small states would not consent to confederate without an equal voice in the formation of treaties." 4 *Debates*, *supra*, at 120.

To further empower each individual State, the Framers made advice and consent contingent upon a supermajority rule. The few other supermajority requirements in the Constitution are reserved to the most serious matters. *See* U.S. Const. Art. I, § 3, Cl. 6 (providing for impeachment of the President); *id.* Art. I, § 5, Cl. 2 (providing for expulsion of members from the Senate and House). The use of a supermajority requirement to constrain the treaty-making process thus reflects the Framers' belief that the most effective way to protect State prerogatives against infringement by treaties was through a strong structural check. See Oona A. Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1284-1285 (2008).

B. Throughout U.S. History, the Constitution's Structural Checks on the Treaty Ratification Process Have Proven Highly Effective in Protecting State Interests.

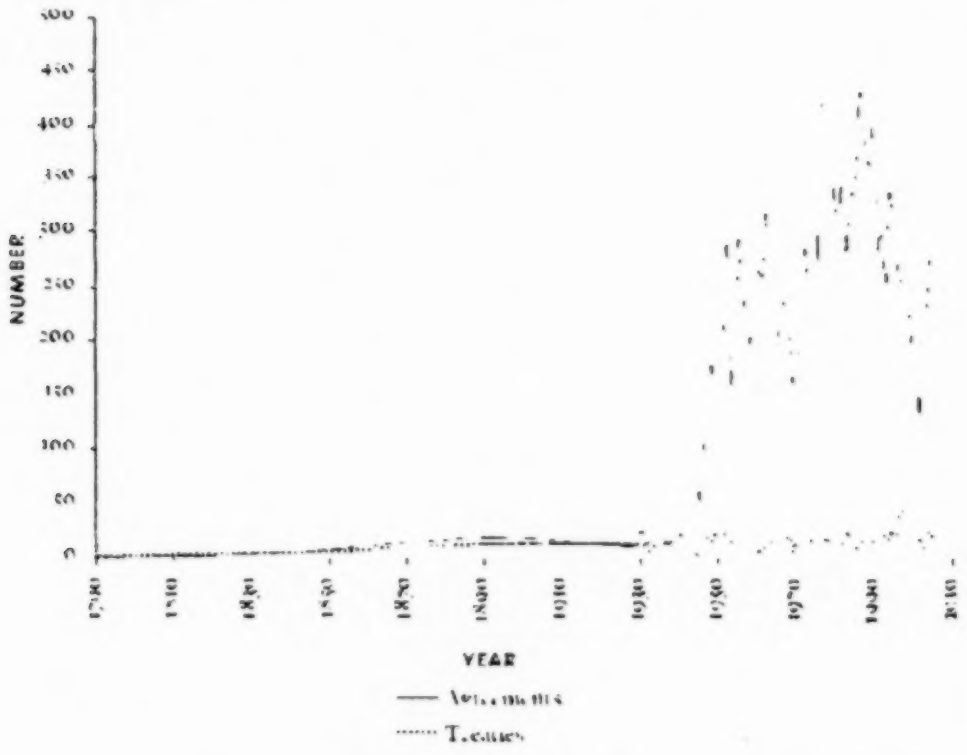
The effect of the extraordinary level of consensus demanded by the two-thirds requirement has been dramatic. Since the time of the Founding, Senate advice and consent has presented a notable and effective barrier to the ratification of Article II treaties implicating areas of traditional state concern – as evinced by the fact that, today, Article II treaties make up a small portion of the international agreements the United States concludes.

From 1980 to 2000, the United States entered into 375 treaties – just under twenty per year. *Id.* at 1258. During the last several years, the numbers have been even lower. The 112th Congress gave advice and consent to only two treaties. See Library of Cong., *THOMAS: Treaties*, http://thomas.loc.gov/home/treaties/treaties.html (last visited Aug. 14, 2013) (search "Treaties" for "advice and consent" in "All Congresses," selecting "All" for "Date Transmitted to Senate" and sorting results by "Latest action"). The current Congress has given advice and consent to none. See U.S. Senate, *Treaties Approved by the Senate During the Current Congress*, http://www.senate.gov/pagelayout/legislative/one_item_and_teasers/trty_rtf.htm (last visited Aug. 14, 2013).

As Figure 1 shows, today Article II treaties comprise a small proportion of the United States' international agreements. The number of international agreements concluded by other means has exploded, even as the number of Article II treaties has remained relatively constant since the Founding. Hathaway, 117 Yale L.J. at 1287. The vast majority of these are congressional-executive agreements. Such agreements are entered by the President authorized by both houses of Congress – usually through legislation giving the President authority to negotiate binding international agreements that preempt inconsistent state law. Unlike Article II treaties, these agreements are unconstrained by the supermajority requirement of the Article II treaty ratification process.

However, such agreements are limited to Congress's Article I authority. *Id.* at 1338-1348.

Figure 1. Executive Agreements and Treaties, 1790-2007[6]



These data demonstrate that, throughout American history, Article II's structural checks have allowed only those treaties with overwhelming political support – and therefore reflecting significant national and international interests of the United States – to survive the ratification process. Because the structural

[6] Figure 1 is reprinted from Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 Yale L.J. 140, 180 (2009).

checks embodied in the Treaty Clause effectively preclude the parade of horribles petitioner and amici have proffered, additional judicial constraints are neither necessary nor appropriate.

C. The Treaty Ratification Process Also Accommodates Federalism Values by Giving the Political Branches the Capacity To Modify Treaty Obligations and Temper Enforcement Strategies.

The structural checks in Article II also allow the political branches to modify the content of the United States' treaty obligations in light of federalism values. "Throughout U.S. history, the treatymakers have used their conditional consent powers to guard against undue intrusions on state prerogatives." Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent,* 149 U. Pa. L. Rev. 399, 409 (2000). These modifications may take various forms. Treatymakers may limit the substance of a treaty to accommodate States' interests, make treaties dependent upon state law, or limit U.S. treaty obligations to those matters within the federal government's jurisdiction. *Ibid.*

States' interests are protected by the Senate's ability to attach reservations, understandings, and declarations (RUDs) at the time of its consent. Federalism-specific RUDs are common, and generally distribute treaty implementation authority among federal, state, and local jurisdictions. Representative

language can be found in reservations the United States has asserted in several major treaties.[7]

Indeed, of the twenty-five international human rights treaties that the United Nations has identified as "core" treaties, the United States has signed twenty (80%), but the President has only submitted seventeen (68%) to the Senate. Hathaway et al., *supra*, at 311. The Senate gave its advice and consent to only twelve (48%), placing explicit federalism RUDs on four. *Ibid.* Of the eight core treaties that the United States has joined without federalism RUDs, six either involve international matters (such as armed conflict) unlikely to raise federalism issues or were ratified before the use of RUDs for this purpose became common. *Ibid.* The remaining two were specifically tailored to avoid any conflict with state interests. *Id.* at 312.

The United States further accommodates federalism values as a political matter by at times depending upon States in the first instance to implement treaties, particularly when the treaty involves a matter of traditional state concern. For example, the

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[7] See, *e.g.*, Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, S. Treaty Doc. No. 100-20; Charter of the Organization of American States, Apr. 30, 1948, 119 U.N.T.S. 54; see generally Advisory Comm. on Int'l Law, *Memorandum Summarizing U.S. Views and Practice in Addressing Federalism Issues in Treaties*, U.S. Dep't of State (Nov. 8, 2002), http://www.state.gov/s/l/38637.htm (listing more examples of federalism RUDs).

United States has relied on state law to fulfill its obligations under one of the two optional protocols to the Convention on the Rights of a Child. See Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. Cal. L. Rev. 1327, 1382-1383 (2006). It has also implemented the Convention on the Form of an International Will using an innovative combination of both federal and state implementing legislation. See Julian G. Ku, *The Crucial Role of the States and Private International Law Treaties: A Model for Accommodating Globalization*, 73 Mo. L. Rev. 1063, 1067 (2008). Such State-centered implementation has not been driven by the courts. It has, instead, been used by the political branches when they concluded that it offered the most appropriate means of effectively implementing and enforcing a treaty.

* * *

For more than two centuries, the Constitution has enabled the federal government to pursue the United States' foreign policy objectives effectively while accommodating State interests. The Constitution grants the federal government a robust, exclusive, and effective Treaty Power. That power is tempered by a set of embedded structural checks, chief among them the requirement that every Article II treaty earn the support of not only the President but also a two-thirds supermajority of the Senate. These constraints are so powerful that only a handful of Article II treaties have received the advice and consent of the Senate in recent years. In short, the

system has successfully protected federalism values while giving the federal government the flexibility it needs to effectively pursue the foreign policy interests of the United States. That delicate balance must not be disturbed now.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the court of appeals.

Respectfully submitted,

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